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No. 945

IN THE

SUPREME COURT

OF THE

United States

October Term, 1955

COY BURNETT and MEL DAR CORPORATION,

Petitioners,

vs.

IRELAND GRAVES, J. CHRYS DOUGHERTY and JOE R. GREENHILL, individually and as members of partnership of GRAVES, DOUGHERTY & GREENHILL, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

APPENDIX

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APPENDIX

A. OPINIONS AND JUDGMENTS BELOW.

1. Judgment of District Court, Western District of Texas. (R-167)

(Caption Omitted)

(Filed in Clerk's office February 24, 1955.)

FINAL JUDGMENT

On the 14th day of February, 1955, came on to be heard the above styled and numbered cause, and came the plaintiffs, Ireland Graves, J. Chrys Dougherty and Joe R. Greenhill, individually and as members of the partnership practicing law under the firm name of Graves, Dougherty & Greenhill; Edward R. Kleberg, John A. Mobley, Leslie S. Lockett, M. Harvey Weil and John Patrick McGloin, individually and as members of the partnership practicing law under the firm name of Kleberg, Mobley, Lockett & Weil; and Gaynor Kendall; and came the defendant Mel Dar Corporation, and all of said parties announced ready for trial; and came the defendant Coy Burnett and announced ready for trial subject to his motions to dismiss said defendant from this cause and to abate and quash the hereinafter described writ of attachment; whereupon a jury of twelve good and lawful men and women, to wit, R. H. Porter and eleven others, was duly empaneled and sworn and the cause proceeded to trial before such jury.

Thereafter, on February 17, 1955, the Court submitted the case to such jury on special issues and the jury re-

turned into court its verdict in the form of its answers to such special issues, which verdict was in all respect adverse to defendants and which verdict found that the plaintiffs had performed for the defendants personal services of the reasonable value of Eighty Thousand Dollars ($80,000.00) and had, in the prosecution of this cause, incurred attorneys' fees of the reasonable value of Five Thousand Dollars ($5,000.00).

It appearing to the Court that under such verdict the defendant Mel Dar Corporation is justly indebted to plaintiffs in the sum of Eighty-five Thousand Dollars ($85,000.00), it is therefore ORDERED, ADJUDGED AND DECREED by the Court that the plaintiffs do have and recover from the defendant Mel Dar Corporation the sum of Eighty-five Thousand Dollars ($85,000.00), together with all costs of suit and with interest thereon at the rate of six per cent per annum from May 10, 1954, until paid, for which recovery let execution issue.

It further appearing to the Court that under such verdict defendant Coy Burnett, jointly and severally with defendant Mel Dar Corporation, is justly indebted to the plaintiffs in the sum of Eighty Thousand Dollars; and it appearing to the Court that a writ of attachment has heretofore issued in the cause of Ireland Graves, et al., vs. Coy Burnet and Mel Dar Corporation, No. 98,542, in the Fifty-third District Court of Travis County, Texas, (the instant case being such cause as removed to this Court) which writ of attachment is recorded in Volume B, pages 116-117, of the Attachment Records of Nueces County, Texas, and that such writ was on May 19, 1954, levied upon the following described property of the defendant Coy Burnett: (*description of attached realty omitted*)

Said property still stands levied upon, and it is therefore ORDERED, ADJUDGED AND DECREED by the Court that said attachment lien as it existed on the 19th day of May, 1954, be, and the same is, hereby foreclosed on such above described property, and that an order of sale shall issue to the sheriff or any constable of Neuces County, Texas, directing him to seize and sell the same as under execution to satisfy the above described indebtedness of defendant Coy Burnett. To all of which action of the Court defendants in open court duly excepted.

Done on this 24th day of February, 1955.

/s/ Ben H. Rice, Jr.
United States District Judge

ENTERED: Civil Court Book, Vol. 3, page 950.

2. Opinion of Court of Appeals for the Fifth Circuit, 230 F. (2d) 49, February 13, 1956.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15656

COY BURNETT and MEL DAR CORPORATION,
Appellants,

versus

IRELAND GRAVES, J. CHRYS DOUGHERTY and JOE R. GREENHILL, individually and as members of partnership of GRAVES, DOUGHERTY & GREENHILL, ET AL.,
Appellees.

Appeal from the United States District Court for the Western District of Texas.

(February 13, 1956.)

Before BORAH and BROWN, Circuit Judges, and WRIGHT, District Judge.

BROWN, Circuit Judge: Having lost, then won, *Burnett v. Mar-Tex Realization Corp.*, 250 S.W.2d 612, Burnett and his family corporation, Mel Dar Corporation now appeal from the judgment entered on a jury verdict awarding $80,000.00 (plus $5,000.00 attorneys' fees) to their attorneys[1] for their successful reversal on appeal.

[1]The verdict and judgment is in a lump sum, without apportionment, for the firm of Graves, Dougherty and Greenhill, who acted as lead counsel in charge of the appeal; Messrs. Kleberg, Mobley, Lockett & Weil of Corpus Christi; and Gaynor Kendall employed specially by Graves with Burnett's consent as a briefing assistant.

The nature of that litigation[2] and its intrinsic merit is now of secondary importance. But even the briefest consideration of it is convincing that it was an important case in which the stakes were high presenting difficult questions challenging the resourceful ingenuity of skilled advocates, and the battle pressed without quarter by leading protagonists in the field of Texas Oil & Gas Law. Not unnaturally the client, vindicated finally in the rightness of his cause, asserts that what transpired was always inevitable and what was simple did not, merely by adverse verdict and judgment, become complex. The attorneys, pointing to the irrefutable proof of an adverse judgment understandably assert that nothing is so uncertain as a jury verdict or a judge's decision, so that an appeal from an adverse judgment suffered at the hands of counsel since displaced by clients, deserves the descriptive "difficult and complex" and all of the diligent skill which that implies.

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[2]Burnett, a lawyer and business man, lived in Los Angeles, California, and owned Shamrock Island in Nueces County. Mar-Tex was anxious to secure an oil and gas lease upon this island. J. Cleo Thompson, an attorney of Dallas, president of Mar-Tex and John D. Wheeler of San Antonio, the then attorney for Burnett, after some preliminary negotiations in Texas, conferred in Los Angeles with Burnett on February 23, 1950. After almost two days' continuous negotiation, drafting and redrafting of a contract for this particular transaction and not a mere adaptation of printed, standard lease forms, the lease was finally drafted, signed and acknowledged by Burnett. This executed lease was turned over to Thompson under a letter signed by Burnett stating that the executed copies of the lease were placed in his hands for the sole purpose of securing their execution by Mar-Tex and turning them over to Burnett's attorney Wheeler. Simultaneously, two letters were addressed by Burnett, one to Wheeler stating that when he received the copies of the oil and gas lease executed by Mar-Tex and the $100,000.00 performance guarantee had been deposited by Mar-Tex with the Frost National Bank as escrow agent, he would be "authorized to make delivery to Mar-Tex * * * of the said lease * * *"; and, the other to the Bank instructing them on the holding of the $100,000.00 deposit as a guarantee of performance of all of the covenants in the lease by the Lessee. Wheeler and Thompson flew back to Texas February 24, 1950. On February 25, the Board of Directors of Mar-Tex met, formally ratified Thompson's action, authorized the execution of the lease which was done. On March 1, Thompson received a wire from Burnett, dispatched February 28, advising that he was withdrawing all negotiations. March 6 Mar-Tex deposited $100,000.00 in the Bank and delivered copies of the lease previously executed to Wheeler. Wheeler returned them to Burnett.

The Mar-Tex lease provided a 40% royalty for Burnett, leaving a 60% working interest in Mar-Tex. Subsequently, August 8, 1950, Burnett leased it to Mel Dar Corporation, reserving a 25% royalty plus a $100,000.00 oil payment out of 37-½% of the gross production. By amendment October 1950 the 25% royalty was

A threshold procedural point in the judgment against Burnett, personally, is urged with great vigor. Jurisdiction over Burnett in the case, filed in the state court and removed for diversity by defendants, was obtained by Attachment, Art. 275 et seq., Rev.Civ.Stat. of Texas, Texas Rules of Civil Procedure 592 et seq. The plaintiffs' Statutory Attachment Bond had Aetna Casualty & Surety Company as a single corporate surety instead of two sureties as literally required by Art. 279.[3] Claiming that this noncompliance would have voided the service in a state court, *East and West Texas Lumber Co. v. Warren & Son*, 78 Tex. 318, 14 S.W. 782; 5 Tex. Jur. 214, §47; *Citizens National Bank of Godley v. Pollard* (Civ.App.), 31 S.W. 2d 508; Burnett insists that the Federal Court, on proper motion as made here, must do the same. *Hisel v. Chrysler*

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changed to 25% of net profits; the oil payment was continued but not to be charged as an expense in determining net profits. This amendment expressly took cognizance of the existence of the adverse claim [by Mar-Tex]. While Mar-Tex's suit to compel delivery of this oil and gas lease was pending, Mel Dar drilled and brought in wells on the land. The trial in the state court was divided into two parts: (1) the issue of whether there had been a binding lease—"contract or no contract" and (2) whether Mel Dar was a good faith improver and entitled to be reimbursed for the cost of the wells drilled by it in the event Mar-Tex were ultimately held to be the lessee. In the trial on the issue (1), conducted for Burnett by other counsel, on a jury verdict a judgment was entered holding that a valid lease had been made and Burnett's effort to withdraw was ineffectual.

At this point Burnett employed Graves to take over the case, try the reserved issue (2) of good faith improvements and, if unsuccessful in efforts to change the trial judge's decision, appeal on the issue of contract-no contract.

Burnett's ultimate position was that the writing, being a lease and not a contract *to* lease, was not binding until delivered and since he had withdrawn from all negotiations prior to the time, as stated in the letters, Wheeler was to have delivered the executed lease, there had been no delivery. Mar-Tex's initial counter-contention was that the lease and the three letters constituted a written contract binding on both; on the appeal, it changed its position to the principal claim that there was an *oral* agreement *to* lease of which the writings were a sufficient memorandum to satisfy the Texas Statutes of Frauds, Art. 3995, §4, Rev. Civ. Stat. of Texas. It is here that the attorneys attribute much value to their skill as they claim the original appellate briefs for Burnett were artfully drafted with the strategic objective of baiting Mar-Tex into the weaker of two positions.

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[3] "Before the issuance of any writ of attachment, the plaintiff must execute a bond with two or more good and sufficient sureties * * * in a sum not less than double the debt * * *. Such bond shall be delivered to and approved by the officer issuing the writ * * *."

Corporation, (W.D.Mo.) 90 Fed.Supp. 655. Appellees meet this head-on relying on Art. 7.01, 7.02, Texas Insurance Code, as authorizing a single, corporate surety.[4]

We agree. The purpose is plainly evident: recognizing both the business world's well-founded apprehension over the frequently unpredictable liabilities from serving as personal surety and the widespread growth of reputable, financially responsible insurance and related corporations providing bonds and guarantees for compensation, the legislature meant to, and did, determine that whenever

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The Court of Civil Appeals reversed and rendered the case in favor of Burnett and against Mar-Tex apparently on the dual ground that as a lease it was ineffective until unconditional delivery which had never been made, and the written memoranda were insufficient to satisfy the Statute of Frauds. Application for writ of error to the Supreme Court of Texas, Texas Rules of Civil Procedure 468, 469, was filed, but refused no reversible error.

The good faith improvement phase of the case was disposed of by the entry of appropriate decree determining Mel Dar was entitled to reimbursement for $513,000.00 in the event Mar-Tex prevailed on the issue "contract-no contract." Fees due Graves and Kleberg for the good faith improvement suit were paid and are not in issue here, although, as discussed later, Burnett attempts to make much of some of the correspondence leading to their payment.

[4]Art. 7.01: "Private corporations may be created to * * *; to act as surety and guarantor * * *; * * * upon any bond or bonds that may be required to be filed in any judiciary proceedings * * *. Any such bond may be accepted and approved by the officer charged by law with the duty of accepting and approving the same without being signed by other sureties than such company. When any such bond shall exceed Fifty Thousand ($50,000.00) Dollars in penal sum, the officer charged by law with the duty of approving and accepting such bond may require that such bond be signed by two or more surety companies, or by one surety company and two or more good and sufficient personal sureties, in the discretion of the principal or official of whom the bond is required, and any statute or law to the contrary, or requiring any such bond to be signed by two or more good and sufficient sureties, shall be governed and controlled by the provisions of this article."

Article 7.02: "Whenever any bond * * * is, by law * * * required * * * to be made * * * such bond * * * may be executed by a surety company, qualified as hereinbefore provided; and such execution * * * shall be in all respects a full and complete compliance with every law * * * that such bond * * * shall be executed by one surety or by one or more sureties * * * and all courts, judges * * * public officers of every character shall accept and treat such bond * * * as conforming to, and fully and completely complying with, every requirement of every such law * * *."

and wherever surety bonds were required, a single[5] corporate surety would comply. It was not the repeal, express or implied, of a special by a general act, cf. *Sam Bassett Lumber Co. v. City of Houston*, 145 Tex. 492, 198 S.W. 2d 879, 39 Tex. Jur. 149, 150, §81; *Jefferson County v. Board of County and District Road Indebtedness*, 143 Tex. 99, 182 S.W. 2d 908; it was the express declaration of an overriding policy, stated in sweeping and emphatic terms, to bring this phase of the judicial and governmental machinery in harmony with modern business developments. *McCaskey Register Co. v. Gooch* (Civ. App.), 31 S.W. 2d 324; *International and G. N. Ry. Co. v. Smith* (Civ. App., error dismissed), 269 S.W. 886; *Commonwealth of Massachusetts v. United North and South Development Co.*, 140 Tex. 417, 421, 168 S.W. 2d 226, 228.

Mel Dar Corporation likewise insists that there were no services rendered for it, and consequently it should be exonerated without further inquiry. We do not agree. Mel Dar was a party in the appeal proceedings, and its interests were placed in Appellees' hands for full protection. It had a great deal at stake. If Mar-Tex won, all Mel Dar had was a recovery of $513,000.00 as good faith development costs, and the working interests which it had under the lease from Burnett would be lost altogether. That Burnett's name was nearly always singled out in the briefs,

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[5]The approval here by the State District Clerk of a single surety met the requirement of Art. 7.01 providing that for bonds in excess of $50,000.00, the officer *may* require two or more surety companies, or one surety company and two or more good personal sureties. The whole statute reflects a purpose to lodge a reasoned discretion and judgment in the approving officer; the term "may" is then permissive, not mandatory, San Angelo National Bank v. Fitzpatrick, 88 Tex. 213, 30 S.W. 1053; American Mortgage Corp. v. Samuell, 130 Tex. 107, 108 S.W. 2d 193; cf. Hess and Skinner Engineering Co. v. Turney, 109 Tex. 208, 203 S.W. 593. Moreover, no actual harm, FRCP 61, is or can be shown for an abuse of the District Clerk's acceptance of one surety company; e.g., see, United States Treasury Department, Form 356, Fiscal Service, Surety Bonds Branch, listing Certificates of Authority under 6 U.S.C.A. §§ 6 to 13 which, for Federal (including court) bonds, approves Aetna Casualty & Surety Co. up to $6,302,000.00 in 1954 and $8,674,000.00 in 1955.

or the emphasis was on him as the moving figure detracts none from Mel Dar's substantial financial interests successfully preserved by the appeal. Moreover, in the long negotiations over the disputed fees, it was Mel Dar's check for $15,000.00 which was twice tendered to appellees. All of this evidence was ample to permit the jury finding that services of value to Mel Dar were rendered imposing on it the obligation to pay a reasonable fee. See *Robert v. Goldman* (Mo. Ct. App.), 299 S.W. 55; *International and G. N. Ry Co. v. Clark & Dyer*, 81 Tex. 48, 16 S.W. 631; *Baum v. McAfee* (Civ. App.), 125 S.W. 984; *Morrison v. Reece* (Civ. App.), 266 S.W. 815; *Babcock v. Glover* (Civ. App. error refused), 174 S.W. 710.

This brings us then to the only real question of substance—whether the jury verdict for $80,000.00 was reasonable or so excessive as to be without foundation. In assaying this, it must be remembered that we are dealing with a verdict of a jury and having himself demanded one, Burnett cannot complain that a jury might have been more liberal than would a judge. We test this verdict as we would any other and, finding ample evidence to support it, approve it as would a Texas Court, *Hirsch v. Dearing* (Civ. App.), 151 S.W. 2d 949; *Southland Life Ins. Co. v. Norton* (Com.App.), 5 S.W. 2d 767. We decline, if we could, *Sunray Oil Co. v. Allbritton*, 5 Cir., 187 F. 2d 475, rehearing 188 F. 2d 751; *Wright v. Paramount-Richards Theatres*, 5 Cir., 198 F. 2d 303, any more than would a Texas court, to disregard the jury verdict and retry the claim or arrive at any independent judgment. Cf. *Campbell v. Green*, 5 Cir., 112 F. 2d 143.

The trial with its hundreds of pages of testimony was concerned primarily with the value of the services performed. This involved two principal facets—the nature of

the litigation and the money value of its fruits. On both, there was an abundance of convincing, trustworthy evidence. On the first, some of the outstanding advocates[6] of the Texas Bar, familiar with the problems of Texas Oil & Gas Law, accustomed to handling large and important cases, collecting imposing fees, familiar from study of the briefs and records in the appeal case, and advised through hypothetical assumptions on dollar values, testifying to fees considerably in excess of that finally fixed, characterized this litigation as difficult, complex, uncertain, fraught with much danger, and the handling of it by appellees as reflecting skillful ingenuity. Weighing heavily in their estimates was the acknowledged capacity of formidable adversaries with their known repute as aggressive, vigorous, tenacious fighters at the Bar.

These experts, as well as several of the appellee attorneys detailed[7] the underlying reasons why the case was deemed difficult and complex. That this inevitably put laymen, the jurors, in judgment upon intricate, abstruse

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[6]These included: A. W. Walker, Jr., Dallas attorney, long-time professor University of Texas, author, writer, acknowledged authority in the field of oil and gas, and a principal attorney for Mar-Tex in the case; James P. Hart, former District Judge, former Justice of the Supreme Court of Texas, Chancellor University of Texas 1950-1954; James W. McClendon, Texas Commission of Appeals 1918-1923, Chief Justice Court of Civil Appeals, Austin, 1923-1949; Everett L. Looney, then immediate past-president State Bar of Texas; Ralph W. Yarborough, former Assistant Attorney General and District Judge; Dan Moody, former Attorney General and Governor of State of Texas and long-time advocate in state and federal courts trial and appellate; and Gills Johnson, Ft. Worth, David T. Searls, Houston, active eminent practitioners in this field.

[7]Complaint is made of the trial court permitting Judge Graves and others to testify generally concerning the background of the case, the activities in California at the time the lease was drafted, the testimony of the witnesses in the trial, and the contentions of the parties on the ground that the record in the Mar-Tex case (it is in our record comprising 1,380 pages of testimony, 289 pages of record) was the best evidence and testimony as to what had taken place in California was patent hearsay. The point is baseless. The record was in evidence for verification by the jury if it thought necessary; this method was undoubtedly an acceptable way to present a usable summary within some reasonable compass. Wigmore on Evidence, §1230; McCormick and Ray, Texas Law of Evidence, §709, page 922; Byrd v. Taylor (Civ. App. error dismissed), 40 S.W. 2d 942; Hartford Accident & Indemnity Co. v. Shaw (Civ. App. error dismissed), 8 S.W. 2d 196;

legal theories, weighing the stratagems of articulate craftsmen, determining whether lawyers had, in fact, or ought to have, labored[8] so long or written so much was, of course, the unavoidable consequence of demanding a jury. There was an overwhelming body of evidence containing intrinsic reliability that, starting as they did with a case lost by another, only the most diligent, plodding, thorough, persistent research, drafting and redrafting, preparing and amending briefs, counterbriefs, reply briefs, would satisfy the high demands of professional diligence.

The money value of the fruits of victory was likewise established with substantial evidence. If Mar-Tex won, Burnett and his company, Mel Dar Corporation, would lose the value of the 60% working interest. Testimony from sources qualified to fix the value of oil reserves, after deducting the costs of development and determining the present value of operating profit on an 8% discount factor, established a market value for this working interest in excess of $2,000,000.00. Burnett and his experts, to be sure, put the value at much less based on factors and

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New Amsterdam Casualty Co. v. Felder & Co., 5 Cir. 214 F. 2d 825; and, basically, the objection misconceives the whole purpose of that evidence. This suit was not upon the original contract made in California, nor was recovery sought here on the basis of a contention or counter-contention made in the prior trial and appeal. It was relevant in order to determine just what had been done by the attorneys, whether it was difficult or simple depended upon the legal issues, problems and questions presented, the intricacy of the evidence, and the like. These contentions, counter-contentions, arguments, refutations, theories and concepts of liability and non-liability, of contract-no contract bore upon that question. These were the "facts" relevant to the issue of attorneys' fees. They existed in addition to, and apart from, the manner in which they may have been recited, from time to time, in that record. Illustrative of this was the never ceasing argument revolving around Osborne v. Moore, 112 Tex. 361, 247 S.W. 498 of which, the vanquished advocate Walker said, the appellees got more out of the case than was actually in it. And, of course, with that record in evidence and there available for use in cross-examination, there is no demonstration of harmful error required by FRCP 61.

[8]The evidence which the jury could well credit showed that Judge Graves, Greenhill, his partner, Weil and Lockett of Corpus Christi and Kendall spent approximately 270 lawyer-days in the preparation of the briefs, the argument and the opposition to the Application for Writ of Error.

differentials which the jury, under the evidence, was permitted to, and apparently did, reject. Even assuming that market value would require a deduction of the total of income taxes[9] payable on revenues produced from the property whether owned by an individual or a corporation, the evidence showed the value to a corporation was not less than $1,336,781.00 and for an individual $661,344.00. The value in any case was substantial and the jury had ample basis for finding a market value for which the property could and would be sold, at a figure as high as $2,000,000.00.

A jury was chosen as the instrument to determine what lawyers did, what they ought to have done, and what the value of those activities was in economic terms to the clients Burnett and Mel Dar. Under instructions submitting the proper standards[10] with a wealth of persuasive, acceptable testimony, they have fixed it. It is reasonable. It is legal. It is approved.

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[9]Pressing hard General Counsel Memorandum 45, 1 CB 65, Art. 201, International Hotel Co. v. Libby, 7 Cir., 158 F. 2d 717, appellants assert it was error for the court to charge the jury, "That in determining the benefit, if any, derived by defendants as the result of the successful appeal * * * you will not consider income taxes, if any, imposed on defendants by reason of income, if any, from the property interest acquired or saved by defendants as the result of said appeal." No objection of any kind was made to the charge when given or even in the motion for new trial. It is raised here for the first time. In the face of such a simple charge (one special issue on the value of appellees' services) and the skillful and lawyer-like way in which counsel for appellants carefully preserved every point, the failure to except seems to have been a calculated, intentional tactical decision weighing the advantages and disadvantages of the instruction as it was given. We decline to consider it. FRCP 51. It was certainly not a fundamental error which we should notice. Indeed, countering the assertion that it was error at all is the strong argument by appellees that if the test is the "take home" dollars to a recipient, there would be no market stability whatever for what to a poor man might be worth a million dollars might turn out to be of little worth to one of wealth. Likewise, in calculating a market value for a sale, the transaction assumed is a capital one in which the tax impact for buyer and seller is quite different.

[10]The trial court adopted verbatim Burnett's definitive instructions on the factors to be considered in ascertaining reasonable value of the attorneys' services, deleting only subparagraph (h) referring to "schedules of fees fixed by the Bar Associations in the communities where the services were rendered," and (i)

There is no merit whatever in the contention that the value of the services of each of the attorneys who worked on the case should have been submitted for separate determination by the jury. The defendants are fully protected by paying all with the apportionment left amongst themselves. And to have cut it up would have been an unrealistic disregard of the actual engagement. Judge Graves was employed as the over-all leader and director. All others were to work with and under his command, and this, Burnett, more than anyone else, fully realized.[11] The successful appeal was handled in fact by all of the lawyers working together as a team. The value to the client was the result of the total process. What each contributed was really of little tangible value apart from its position in the total effort. It was in fact a group of lawyers working together for two clients in a common cause, exposed to common perils and reaping a mutual reward. What was in fact common, the law may treat the same.

Raised in various ways, requests for submission of special charges and motions, are the contentions that somehow appellees were estopped to charge more than $15,000.00, claim fees on any basis other than the per diem charged in other cases being handled for Burnett, breached some duty in not informing Burnett at the outset of the

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"hourly rates paid by Burnett to the plaintiffs or any of them for comparable legal problems or litigation." Failure to submit subparagraph (h) is not even briefed, and there is no substance to the contention made in several forms for failure to submit subparagraph (i), as well as specific issues inquiring concerning per diem charges made by appellees in other and unrelated cases for Burnett. The engagement here admittedly was for the handling of the Mar-Tex litigation and the appeal if necessary. What they were charging in other cases, what the circumstances were on which a different basis of compensation was made or agreed, what the issues and difficulties were, were all foreign to this already complex case.

[11]In his letter of May 21, 1951 to Judge Graves, Burnett wrote: "I, of course, approve your employment of the attorneys in Austin and will continue to do this in future matters handled for me when you deem it necessary.

"In other words, I like to generally rely on a leader who gets results and I think you know how to get them."

engagement what the fee would be, and, by failing to keep detailed time records, had lost the right to claim a substantial fee. None has any merit.

There is no evidence which raises even a suspicion of unprofessional conduct or breach of their highest duty as counsel. To claim a large fee which a jury on ample evidence finds to be reasonable does not restrospectively impose a burden on the attorney to have pointed out at the beginning that the fee might ultimately be large. Burnett's letter, pressed so heavily on us, written within a month of the engagement, discussing a $15,000.00 fee related to the good faith improvement claim just completed and expressed the idea that a *like* fee would be payable on the "contract-no contract" suit *if* no appeal were needed. This was no representation as to what would be due if an appeal were necessary, nor did it put on the attorneys the duty of indicating that or any other sum. So far as these bore generally on the value of services rendered, the jury was the judge. None presented a matter for special instruction, much less peremptory direction.

While the matter is not at all certain, we think that, under the circumstances, interest on the $5,000.00 allowed for appellees' attorneys ought to commence on the date of judgment, February 24, 1955, and not the date of the demand, March 10, 1954, fixing the interest on the $80,000.00 adjudged. See *Peoples Savings Bank v. Marrs* (Civ. App.) 206 S.W. 847; *American Nat. Ins. Co. v. Ellington* (Civ. App.), 97 S.W. 2d 983; *Kramer v. Wilson* (Civ. App. N.R.E.), 226 S.W. 2d 675; *Powell v. Hamilton* (Civ. App.), 197 S.W. 2d 540; cf. *Johnson v. Universal Life & Accident Ins. Co.* (Com. App.), 127 Tex. 435, 94 S.W. 2d 1145. The judgment will be modified accordingly but in view of the very small reduction in relation to the balance affirmed,

and the evident certainty that the appeal on the wide front would have been taken in any case, all costs will be taxed against appellants.

Modified, and as modified, Affirmed.

A True Copy:
Teste:

/s/ JOHN A. FEEHAN, JR.
Clerk of the United States Court of Appeals for the Fifth Circuit.

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3. Judgment of Court of Appeals for the Fifth Circuit.

JUDGMENT.

Extract from the Minutes of February 13, 1956.

No. 15656. COY BURNETT and MEL DAR CORPORATION versus IRELAND GRAVES, J. CHRYS DOUGHERTY and JOE R. GREENHILL, individually and as members of partnership of GRAVES, DOUGHERTY & GREENHILL, ET. AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, modified in accordance with the opinion of this Court, and as modified, that said judgment be, and it is hereby, affirmed.

It is further ordered and adjudged that the appellants, Coy Burnett and Mel Dar Corporation, and the surety on

the supersedeas bond herein, United States Fidelity and Guaranty Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

B. STATUTES, RULES, ETC.

1. United States Constitution

(a) Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

(b) Seventh Amendment:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

(c) Section 1, 14th Amendment:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Constitution of Texas, Article 1, Section 19:

"No citizen of this State shall be deprived of life, liberty, property, privileges or immunities or in any manner disfranchised except by the due course of the law of the land."

3. Article 279, Vernon's Revised Civil Statutes of Texas, and Predecessor Statutes (Attachment):

(a) Article 279, Revised Statutes of the State of Texas, 1925.

"Before the issuance of any writ of attachment, the Plaintiff must execute a bond, with two or more good and sufficient sureties, payable to the Defendant in a sum not less than double the debt sworn to be due, conditioned that the Plaintiff will prosecute his suit to effect, and will pay all such damages and costs as shall be adjudged against him for wrongfully suing out such attachment. Such bond shall be delivered to and approved by the officer issuing the writ, and shall, together with the affidavit, be filed with the papers of the cause."

(b) Revised Statutes of The State of Texas, 1911, Art. 244. Plaintiff must give bond with security.

"Before the issuance of any writ of attachment, the Plaintiff must execute a bond, with two or more good and sufficient sureties, payable to the Defendant in a sum not less than double the debt sworn to be due, conditioned that the plaintiff will prosecute his suit to effect, and will pay all such damages and costs as shall be adjudged against him for wrongfully suing out such attachment."

(c) Revised Statutes of The State of Texas, 1911, Art. 245. Bond to be approved and filed.

"Such bond shall be delivered to and approved by the officer issuing the writ, and shall, together with the affidavit, be filed with the papers of the cause."

(d) Revised Statutes of The State of Texas, 1895, Art. 190.

"Before the issuance of any writ of attachment the Plaintiff must execute a bond, with two or more good and sufficient sureties, payable to the Defendant in a sum not less than double the debt sworn to be due, conditioned that the Plaintiff will prosecute his suit to effect, and will pay all such damages and costs as shall be adjudged against him for wrongfully suing out such attachment."

(e) Revised Statutes of The State of Texas, 1879, Art. 156.

"Before the issuance of any writ of attachment the Plaintiff must execute a bond, with two or more good and sufficient sureties, payable to the Defendant in a sum not less than double the debt sworn to be due, conditioned that the Plaintiff will prosecute his suit to effect, and will pay all such damages and costs as shall be adjudged against him for wrongfully suing out such attachment."

(f) Acts of 1848, Art. 1830, Sec. 5.

"That the plaintiff, his agent or attorney, shall, at the time of making such affidavit, give bond, with two or more good and sufficient sureties, payable to the defendant in at least double the amount sworn to be due, conditioned that plaintiff will prosecute his suit to effect, and pay such damages as shall be adjudged against him for wrongfully suing out such attachment."

Historical Comment: Based on Art. 4969, R.S. 1925 (Acts 1897, p. 128; Acts 1903, p. 197; R.S. 1911, Art. 4928; Acts 1913, p. 123).

Art. 7.02. Bond of Surety Company.

Whenever any bond, undertaking, recognizance or other obligation is, by law or the charter, ordinances, rules and regulations of a municipality, board, body, organization, court, judge or public officer, required or permitted to be made, given, tendered or filed, and whenever the performance of any act, duty or obligation, or the refraining from any act, is required or permitted to be guaranteed, such bond, undertaking, obligation, recognizance or guarantee may be executed by a surety company, qualified as hereinbefore provided; and such execution by such company of such bond, undertaking, obligation, recognizance or guarantee shall be in all respects a full and complete compliance with every law, charter, rule or regulation that such bond, undertaking, obligation, recognizance or guarantee shall be executed by one surety or by one or more sureties, or that such sureties shall be residents, or householders, or freeholders, or either, or both, or possess any other qualification and all courts, judges, heads of departments, boards, bodies, municipalities, and public officers of every character shall accept and treat such bond, undertaking, obligation, recognizance or guarantee when so executed by such company, as conforming to, and fully and completely complying with, every requirement of every such law, charter, ordinance, rule or regulation. Any suit on any bond issued under this and the preceding article shall be brought at the place as provided for in this chapter, and if the company issuing the bond sued on has no agent in the county where said bond was issued, then the Chairman of the Board of Insurance Commissioners is

made, by consent of the said company, its agent on whom service of process may be had. Acts 1951, 52nd Leg., ch. 491.

Historical Comment: Based on Art. 4970, R.S. 1925 (Acts 1897, p. 128; Acts 1903, p. 197, Acts 1913, p. 123; R.S. 1911, Art. 4929).

5. Federal Rules of Civil Procedure:

(a) Rule 51. Instructions to Jury: Objection

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

(b) Rule 61. Harmless Error

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

6. General Counsel Memorandum 45, 1 C. B. 65

"ARTICLE 201: Depletion of Mines, V-25-2803 oil and gas wells; depreciation of GCM 45 improvements.

REVENUE ACT OF 1926

"Effect may be given to future Federal taxes in the determination of the values of assets when such values must be established by appraising expected future earnings.

"An opinion is requested as to whether, without reference to any specific case or statement of facts, effect may be given to future Federal taxes in the determination of the values of assets when such values must be established by appraising expected future earnings.

"The value sought for such assets in each case is the fair market value between a willing buyer and a willing seller of the property from which the future expected income is to be derived. The Bureau, therefore, should as nearly as possible assume the place and attitude of the buyer of the assets in question and thus take into consideration all the elements which he as a prudent business man will weigh in determining what he can safely pay for the property.

"It is apparent that present value for a prospective buyer will be affected by every element, physical, or otherwise, which will reflect on the income emanating from the operation, production, or other use of the assets. That future Federal taxes will definitely affect such income and therefore the present earning value of the property can not be questioned . . .

A. W. GREGG,
General Counsel,
Bureau of Internal Revenue"

C. STATEMENT OF PETITIONERS' EVIDENCE ON THE ISSUE OF ESTOPPEL WITH REFERENCE TO RECORD.

Respondent Graves testified that prior to the Mar-Tex case, for which fees are now sought, he had represented petitioner Burnett in other matters and had submitted bills for services performed. (R. 412-413). He also testified that nothing was said between the parties about the fee for the Mar-Tex appeal. (R. 263). However, on May 17, 1951, Judge Graves wrote Mr. Burnett a letter in which was enclosed a statement for $16,000 covering attorneys' fees for the trial court work on the second phase of the Mar-Tex case. (Pets.' Exhibit No. 7).

On May 21, 1951 Mr. Burnett answered, stating that he thought the fees were "on the top side" and requested information as to total fees to be expected in the following language: "I would like, however, to know how many years of profit are going to be absorbed in the attorneys' fees as my 40% is already hypothecated for several years." He also indicated that he would be willing to consider an additional fee "in substantially the same amount" for obtaining the desired result—conclusion of the Mar-Tex case. (Plts.' Exhibit No. 8, R. 68-69).

Burnett, when testifying concerning this letter requesting explanation if his suggestions as to fees were not satisfactory, explained concerning the previous employment and attorney-client relationship that Graves knew "what fees he had gotten from us for several years" (R. 584) and further explained why $15,000 was a reasonable fee herein as follows: "That is what it was worth to us, and what was fair in view of our relations with him, which had been practically on that basis of compensation" (R. 586)

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Judge Graves answered Mr. Burnett's letter on May 24, 1951, and the only reference to Mr. Burnett's comments and requests about the fees was his statement that: "I have talked with the Corpus Christi counsel, and we think your counter suggestions are entirely reasonable and fair." (Plts.' Exhibit No. 9, R. 70).

Thereafter, in the regular course of business, Mr. Burnett arranged with his bankers to set up a reserve of $15,000 specifically to cover the attorneys' fees for the Mar-Tex appeal. (Pltf.s' Exhibit No. 26).

Although Graves was experienced in dealing with cases in which handsome fees were collected (R. 366-367), he never intimated to Burnett the time expended or the nature or magnitude of his expected fee, and nothing was said regarding fees until the Mar-Tex case had been won on appeal, when for the first time Judge Graves wrote Mr. Burnett on December 28, 1952, suggesting a fee ranging from $75,000 to $100,000. (Plts.' Exhibit No. 25, R. 71-72). Burnett's shock at this demand is evidenced by his December 31, 1952 letter in reply. (Plts.' Exhibit No. 26, R. 73-74).

The evidence tending to establish estoppel as to the various elements going to make up a reasonable attorney's fee is as follows:

TIME SPENT ON THE CASE

Although Judge Graves testified that when he was first employed he was told by Mr. Burnett that it would be desirable to keep some kind of a time record of the time spent on the case (R. 283), he admitted that no accurate record was ever kept, that had he been younger he could have done it, he extemporaneously at about the time it became apparent that Burnett was bringing in a good oil producing area decided that "it is too late for me to start that now" (R. 338). The record is bare of any evidence showing that any sort of a running account of time spent by Graves was ever furnished Burnett, although to that time Graves had substantially complied with Burnett's time record request by a diary furnished Burnett in support of the $16,000 trial court fee. (Plts.' Exhibit No. 7).

In this connection, when Judge Graves made an offer of settlement on July 20, 1953, he estimated that all the attorneys involved had spent 365 man hours working on the appeal (or approximately forty-six eight hour days), as justification for a $55,000 fee. On July 20, 1953, Graves wrote that the 365 "man hours" were "man days" (one continuous year's work). (R. 88-90). This must be compared with the opening statement by respondents' attorney, where it was said that the attorneys had worked 254 days on the appeal—111 days less than that originally claimed by Graves. (R. 205). This astonishing variance in estimates of the time spent on the appeal points up the prejudicial result of non-compliance with Burnett's request that such records be kept. (R. 283).

ASSERTED COMPLEXITY OF MAR-TEX CASE

There was a dispute as to whether respondents were estopped to claim great complexity of legal issues in the Mar-Tex case by several things proven in the record, and especially by Graves' appraisal of those issues after he thoroughly understood them. By letter of June 6, 1951, Graves expressed his opinion as follows: (Plts.' Exhibit 46)

> "That there was no contract because Mar-Tex never did accept until after Burnett had withdrawn his proposal can be shown to the point of demonstration. *It is so clear that I do not see how a clear headed, honest judge can fail to sustain it.*"

It is undisputed that this "Contract-No Contract" point is the one that finally won the appeal. (Plts.' Ex. 20, p. 70).

Burnett, in proceeding with the development of the area during the hazardous period of litigation, had relied upon the advice of many attorneys, including Graves, that the issue of contract or no contract under the facts of the Mar-Tex case was settled in his favor by applicable Texas Supreme Court cases. It is significant that all of the attorneys of that belief were satisfied with the fees paid or offered and no firm or individual asked more than $7,500, except Graves and his $500 assistant and they based their claim upon time the two spent, as they said:

> "planning to force able counsel on the other side to take the weakest position upon the record facts." (Pltfs.' Ex. 29, p. 2).

which were based upon writings admittedly passing between the parties.

Thus, there is substantial evidence of record which shows that the case was presented as a relatively simple one by Graves, albeit like any appeal, it had to be carefully presented.

THE CONTINGENCY OR CERTAINTY OF COMPENSATION

Graves had represented Burnett in other previous matters (R. 412-413), and had been satisfactorily paid therefor. He had never represented Burnett on a contingent fee basis (R. 584), and the compensation was certain, regardless of results obtained. (R. 586). The diary or time record attached to the $16,000 bill for trial court services (Plts.' Exhibit 7) indicated that Graves valued his time at approximately $17.50 per hour. Graves never intimated to Burnett that on the appeal he would demand several times this amount. The record shows that Graves agreed to work for Mr. Burnett for $10.00 per hour in another important case after the Mar-Tex appeal. (Plts.' Exhibits 31, 48, 49, 50; Defts.' Exhibit 4; R. 77-87).

AMOUNT INVOLVED, RESULTS OBTAINED, AND BENEFIT TO CLIENT

The evidence was conflicting as to the value of the result secured to the client. (R. 250, 540, 600). However, it is undisputed that Graves never even intimated that his fee would be predicated upon an asserted benefit of $2,000,000, although he was well acquainted with the property development involved at all times.

SUMMARY OF ESTOPPEL ISSUE

Petitioners' evidence tended to show that Graves failed in his duty to the client, Burnett, when he:

(1) Failed to keep a time record as requested, and failed to advise Burnett as to the enormous amount of time needed or assertedly expended;

(2) Failed to advise Burnett that the complexity of the case would result in a much larger than usual fee—after calling it a simple case initially;

(3) Failed to advise Burnett of his determination to base his fee on his opinion that the benefits to be secured would be $2,000,000;

(4) Failed to advise Burnett that the Mar-Tex appeal fee would be charged on a different fee basis than theretofore used by the parties;

(5) Failed to correct Burnett's impression that $15,000 would be a reasonable fee, when specifically requested to speak by Burnett;

This silence by Graves, if believed by the jury to be a violation of his duty as an attorney, could support a finding of estoppel by silence.

Petitioners contend that the sum total of the evidence above was sufficient to create an issue of fact requiring the submission of their affirmative defense of estoppel to the jury by proper instruction.

PETITIONERS' EVIDENCE REGARDING SEPARATE EMPLOYMENT OF THE SEVERAL ATTORNEYS

Several firms of attorneys worked on the Mar-Tex case for petitioner Burnett. Respondents' original petition below alleged:

> ". . . Defendant Coy Burnett tendered employment . . . to plaintiffs Graves, Dougherty & Greenhill . . . said plaintiffs accepted employment . . . and upon their recommendation said defendant also engaged the services of the plaintiffs composing the law firm of Kleberg, Mobley, Lockett & Weil. . . . These employments were perfected by defendant Burnett." (R 12).

The verdict of the jury was for $80,000 in favor of all the plaintiffs against both defendants jointly. (R. 167-168). This joint verdict theory was approved by the trial court when it refused petitioners' request to submit the value of each attorney's services for separate determination by the jury. (R. 159). The Court of Appeals below likewise approved when it held: (Appendix, p. 13)

> "It was in fact a group of lawyers working together for two clients in a common cause, exposed to common perils and reaping a mutual reward. What was in fact common, the law may treat as the same."

The undisputed record facts concerning the creation of the Graves-Burnett-Mar-Tex employment and the separate employment of the other attorneys include the following: (1) Graves testified that he was employed on the Mar-Tex case "in March or the early part of April 1951" (R. 269-270); (2) That Mr. Burnett, not Graves, employed the Kleberg firm (R. 272); (3) That in the opinion of the members of the Kleberg firm the value of their services was but $7,500—only 7 1/2% of the total attorneys' fees sued

for—although their services were substantial when compared to those of Graves who wanted over 90% of total fees claimed. (R. 441, 496, 499).

It is appellants' contention that the trial court's refusal to instruct the jury to ascertain the reasonable value of each respondent attorney's services was prejudicial in that it thus masked the fact that one lawyer, Graves, was to receive a staggering percentage of the combined fee, disproportionate to the time and responsibility involved. Graves thus rode on the shoulders of the other lawyers who labored on the case, and reaped a rich harvest. For all the record indicated to the jury, all the lawyers who worked on the case were to share equally in the fee. It is reasonable to assume that this consideration bulked largely in the eyes of the jury, and directly led to the size of their verdict.

During the trial, respondents placed great stress on the difficulty of overcoming the assertion of Mar Tex that Burnett was a "California welcher", and justified much of their labor on this ground. (R. 455.) The record is clear, however, that such alleged "welching" if any, occurred long prior to Mel Dar's entry into the case. The record is also quite clear that a very simple presentation on appeal was required for Mel Dar—the "good faith improver" which had prevailed in the trial court. Therefore, the trial court's acquiescence in lumping the two defendants together and refusing the requested instruction was highly prejudicial to Mel Dar.

CHARGE BY TRIAL COURT TO JURY TO DISREGARD INCOME TAX

Respondent Graves testified that one of the recognized criteria used to judge the reasonable value of an attorney's services and perhaps the most important, is the benefit secured to the client by the attorney's efforts. (R. 367-368). The parties herein were in substantial disagreement, and the evidence was greatly in conflict as to the results achieved or the benefits secured to Burnett by reason of the successful Mar-Tex appeal. Petitioners' evidence was to the effect that such benefit was approximately $220,000. (R. 540, 600). Respondents' witnesses valued it at about $2,081,000. (R. 250). In part, this was due to the different formulas used, but essentially, it reflected the fact that in calculating the benefit, petitioners' witnesses took the impact of income taxes into account, and respondents' witness, Crutchfield, did not. (Plts.' Exhibit 6).

At the close of the trial, the trial court instructed the jury not to consider income taxes in determining the benefit derived by the petitioners from the Mar-Tex appeal. (R. 160.)

The Court of Appeals below recognized the point when it took judicial cognizance that in the case of an individual taxpayer, such as petitioner Burnett, the $2,081,000 Crutchfield valuation would be reduced to $661,344 after payment of income tax—a significant difference of some $1,420,000—a net but one-third of the Crutchfield figure, but passed the subject by saying: "The value in any case was substantial." (Appendix, p. 12.)

D. SUPPORTING POINTS AND AUTHORITIES FOR PRINCIPLES URGED IN PETITION.

I. The Court Below Had No Jurisdiction to Enter the Judgment in Question.

A. The Court Below Applied the Wrong Statute and Thereafter Misconstrued the Plain Language of Article 7.01 of the Texas Insurance Code, Relied Upon by Respondents.

Petitioners have made the point in their petition (p. 6) that the construction of Article 7.01 by the Court below so as to allow but one surety was erroneous. The Texas cases on the subject bear this out conclusively. For example, in the case of *Commonwealth of Massachusetts v. North and South Development Company*, 168 S.W. 2d 226 (Tex. Sup. Ct. 1942), involving the Texas garnishment statute, the Court said: (p. 229)

> "And the officer charged with the duty of approving and accepting this bond has no authority, discretionary or otherwise, to approve a bond which does not comply with the specific or express terms of the statute."

The Texas Supreme Court there rejected the argument made by the Fifth Court that no harm is shown by one surety instead of two when the surety accepted is solvent (Appendix, p. 8) in the following language: (p. 229)

> "The argument of appellant that 'the large number of sureties on this bond in limited amounts, aggregating "double the amount of the debt claimed", affords as much, if not more protection . . .' is a matter primarily for the legislature to determine, and not having authorized such limitation of liability, the right to do so must be denied."

And finally, the Court held that the precise statute used by the Court below to justify but one surety was subordinate to the Texas garnishment statute, in the following language: (p. 228)

> "By plain and unambiguous language, Art. 4077 provides that before a writ of garnishment shall issue the plaintiff shall execute 'a bond with two or more good and sufficient sureties . . .' This language can only mean that each surety must be bound jointly and severally . . ."

B. The Court Below Denied Petitioner Burnett's Plea of Lack of Jurisdiction In Conflict With the Decisions of This Court.

The Court below held that a general Texas statute governing judicial bonds controlled a special Texas statute governing attachment bonds, and rationalized its position by the bold statement that the general statute ". . . was not the repeal, express or implied, of a special by a general act . . ." (230 F. 2d 49, 57; Appendix, p. 8). In fact, the Court's Opinion holding the special act's requirement of two sureties inoperative, could only be a judicial declaration that the general statute impliedly repealed the special attachment statute.

(1) Legislative History

This issue turns upon the construction and interpretation of the special Texas statute governing attachment bonds (Rev. Civ. Stat. Art. 279) and the general statute relating to sureties and trust companies including the filing by such companies of bonds in judicial proceedings. (Texas Insurance Code, Art. 7.01, 7.02.)

Article 279, the special Texas attachment bond statute provides in part:

> "Before the issuance of any writ of attachment, the Plaintiff must execute a bond, with two or more good and sufficient sureties. . . . "

Article 7.01 of the Texas Insurance Code, the general statute governing corporate sureties, provides in part as follows:

> " . . . Any such bond may be accepted and approved by the officer charged by law with the duty of accepting and approving the same without being signed by other sureties than such company. When any such bond shall exceed Fifty Thousand ($50,000.00) Dollars in penal sum, the officer charged by law with the duty of approving and accepting such bond may require that such bond be signed by two or more surety companies or by one surety company and two or more good and sufficient personal sureties . . . and any statute or law to the contrary, or requiring bond to be signed by two or more good and sufficient sureties shall be governed by the provisions of this article. . . . "

The legislative history of these two statutes completely negatives the decision of the Court below that Art. 7.01, 7.02 *controlled* Art. 279, the special attachment statute.

In the Texas revised statutes of 1911, the special attachment statute was Article 244. In 1913 the present Articles 7.01 and 7.02 assumed their present wording, so far as is here relevant. When all the Texas statutes were revised in 1925, no relevant change was made in the language of either statute and they were reenacted together as part of the same legislative plan. The reenactment of Article 279 without change in 1925—twelve years after Article 7.01 and 7.02 assumed their present form is conclusive evidence that the Legislature intended that the special attachment statute was not to be affected in any way by the general

statute governing corporate sureties—Articles 7.01, 7.02 of the Texas Insurance Code.

On these facts, the decision below stands in sharp conflict with the long-settled rule in this Court. As the Court said in *Morf v. Bingaman*, 298 U. S. 407, 414, 80 L. ed. 1245, 1251: (p. 414)

> ". . . Repeal by implication is not favored, especially where the one act follows close upon the other, at the same session of the legislature . . ."

If this Court should disagree upon this point there still remains the clause of Article 7.01 which provides that when the bond exceeds $50,000, the clerk may require two corporate sureties *or* one corporate surety and two or more good and sufficient personal sureties, erroneously construed by the Court below to allow but one surety.

(2) General Rule that Special Statute Will Control a General Statute on the Same Subject.

As well stated in the case of *Baltimore Nat. Bank v. State Tax Commission*, 297 U. S. 209, 80 L. ed. 586: (p. 215)

> ". . . 'It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling.' (Citing 6 Supreme Court decisions)"

(3) There was No Express Repeal of Article 279, Nor Did the General Statute Work an Implied Repeal.

It has long been settled in this Court that repeals of statute by implication are never favored, and are never admitted when the former act can stand with the new act,

but only where there is positive repugnance between the statutes, and the latter is plainly intended as a substitute for the former.

Illustrative of this settled rule is the statement by this Court in the recent case of *Rosenberg v. United States*, 346 U.S. 273, 97 L.ed. 1607 (1953) that: (pp. 294-295)

> ". . . Nor can the partial overlap of two statutes work a *pro tanto* repealer of the earlier Act. *Id.* 'It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible . . . The intention of the legislature to repeal "must be clear and manifest" . . . . It is not sufficient . . . "to establish that subsequent laws cover some or even all of the cases provided for by (the prior act); for they may be merely affirmative, or cumulative, or auxiliary." There must be "a positive repugnance between the provisions of the new law, and those of the old." ' *United States v. Borden Co.* 308 U.S. 188, 198, 84 L. ed. 181, 190, 60 S. Ct. 182 (1939)."

Since Articles 7.01, 7.02 of the Insurance Code did not expressly repeal the special attachment statute (Art. 279, Rev. Civ. Stat.) the Court below can only have ruled in favor of an implied repeal. This holding is at variance with the authorities set out above.

C. The Court Below Has Decided an Important Question of Texas Law in Conflict with Applicable State Law.

The Texas cases hold that the Texas attachment bond statute must be strictly complied with. (*Mays v. Lewis*, 4 Tex. 1 (1849); *East and West Texas Lumber Company v. Warren & Sons*, 78 Tex. 318, 14 S.W. 783 (Tex. Sup. Ct.

1890); *Hamberlin v. Aston*, 267 S.W. 684, (Comm. App. 1924); *Commonwealth of Massachusetts v. United North and South Development Company*, 168 S.W. 2d 226 (Tex. Sup. Ct. 1942); *Citizens' National Bank of Godley v. Pollard*, 31 S.W. 2d 508 (Waco Civ. App. 1930).) This general rule has long been approved by this Court. In the case of *Mitchell v. St. Maxent*, 4 Wall. 237, 18 L.ed. 326 (1866) the Court said: (p. 243)

> " . . . the law of attachment, being in derogation of the common law, courts are not inclined to extend its provisions beyond the requirements of the statute authorizing it . . ."

The Fifth Court of Appeals has endorsed this rule of strict compliance with the Texas Attachment Statute. In *Massman v. Snyder*, 37 F. (2d) 825 (CCA 5th 1930), the Court said: (p. 826)

> ". . . attachment proceedings are *stricti juris.*"

The Texas cases also hold that where there are both general and special statutes on a particular subject, the special will control, unless the general repeals the alleged inconsistent portion of the special statute. (*Ellis v. Batts*, 26 Tex. 703 (1863); *Flowers v. Pecos River R. Co.*, 156 S. W. 2d 260 (Tex. Sup. Ct. 1941); *Sam Bassett Lumber Co. v. City of Houston*, 145 Tex. 492, 198 S. W. 2d 879 (Tex. Sup. Ct. 1947); *State v. Humble Oil and Refining Co.*, 187 S. W. 2d 93 (Tex. Civ. App. 1945).) Contrary to this established rule, the Court below held that there was no implied repeal—but that the general statute nevertheless controlled the special.

Finally, in accord with the general rule in most, if not all jurisdictions, the Texas cases hold that repeals by implication are never favored. (*Cole v. State*, 170 S. W. 1036

(Tex. Sup. Ct. 1914); *City of El Paso v. Forti*, 181 S. W. 2d 576 (Tex. Civ. App. 1944); *Richardson v. Cameron County, Texas*, 275 S. W. 2d 709 (Tex. Civ. App. 1955).) Yet, the Court below, although disclaiming an implied repeal, accomplished just that by its decision.

In *Jefferson County v. Board of County and District Road Indebtedness*, 182 S. W. 2d 908 (Tex. Sup. Ct. 1944), the Supreme Court of Texas spelled out the specificity of statutory terminology necessary for a general statute to effect an implied repeal of a special statute. The Court held that while the words "shall prevail over any other law, *whether general or special*" did effect an implied repeal; the words "in the event of a conflict between this Act *and any other Act*, this Act shall prevail" were insufficient to repeal a special statute, saying: (p. 915)

> ". . . Ordinarily, a general repealing clause of inconsistent Acts does not, when contained in a general Act, operate to repeal a local or special Act, even though the provisions of the two Acts are in some respects inconsistent. 59 C. J. 904. The intention to repeal special Acts embodying conflicting provisions must be clearly evidenced . . ."

The language of the decision in the *Jefferson County* case quoted above, is decisive and controlling herein. Article 7.01 of the Texas Insurance Code, relied upon by respondents and the courts below, reads "*any statute or law* to the contrary . . . shall be governed by . . . this article . . . " This was insufficient to work an implied repeal of Article 279 governing attachment bonds.

By failing to apply appropriate Texas law to the question before it, the Court below was in error. (*Erie R. Co. v. Tompkins*, 304 U. S. 64; *Guaranty Trust Co. v. York*, 326 U. S. 99.)

D. The Decision Below Is in Direct Conflict with the Decision of the Court of Appeals for the District of Columbia in Tri-State Motor Corporation v. Standard Steel Car. Co., 276 F. 631.

The issue in the *Tri-State* case was whether a general bond statute impliedly repealed a special attachment bond statute containing requirements inconsistent with the general statute. The Court held: (p. 633)

> "When the Congress enacted section 445, its attention was specifically directed to the matter of attachments, while it may not have been thinking of attachments at all when it framed section 479a. That which must have been in the mind of the Congress controls that which may not have been although included within the language of 479a. Following this reasoning, we hold that section 479a, being a general statute, does not provide for bonds in attachment proceedings — that subject is governed by section 445."

It is submitted that the decision of the Court below conflicts with these familiar principles of statutory construction and the law of attachment, and thus gives rise to the necessity for the settlement by this Court of the disputed question.

E. The Decision Below Is in Direct Conflict with Its Own Decision in Home Owner's Loan Corporation v. Creed, 108 F. 2d 153 (1939).

In *Home Owner's Loan Corporation v. Creed*, 108 F. 2d 153 (CCA 5th 1939), it was held that special legislation is not to be repealed by later general legislation unless the repeal be express or the implication to that end is irresistible, and that the special remains in force as an exception to the general. The decision of the Court below was in

effect that the general statute (Art. 7.01, 7.02 Texas Ins. Code) controlled a special statute (Art. 279 Rev. Civ. Stat. Texas) on the same subject—attachment—even though the court said that such general statute did not effect an implied repeal of the special statute.

F. The Decision of the Court Below Affirming the Trial Court in Effect Deprives Petitioner Burnett of His Property Without Due Process of Law, and Equal Protection of the Laws Under the Fifth and Fourteenth Amendments to the Federal Constitution and the Texas Constitution.

(1) If, as Petitioner Contends, the Attachment Bond was Fatally Defective, the Trial Court Never Acquired Jurisdiction Over Burnett, and Its Judgment Against Burnett was Void.

Petitioner Burnett, a resident of California, was never personally served with process, nor was any substituted service or service by publication ever attempted by respondents. Respondents relied solely upon the attachment of Burnett's Texas property.

Burnett did appear specially to attack the Court's jurisdiction (R. 28-30) and after denial of his motions, specifically subject to his objection of lack of jurisdiction, answered the complaint. (R. 54, 33-35)

It has long been settled that such facts do not convert a special appearance into a general appearance, and that the question of lack of jurisdiction can be raised on appeal.

As the Court said in *Hassler v. Shaw*, 271 U. S. 195, 70 L. ed. 900 (1926): (p. 200)

> " . . . Then it is said that pleading to the merits was an appearance, notwithstanding the effort of the defendant to subordinate its denial of the cause of action to its protest against the jurisdiction . . . This again would be unjust, but such is not the law. *Harkness v. Hyde,* 98 U.S. 476, 479, 25 L.ed. 237, 238; *Southern P. Co. v. Denton,* 146 U.S. 202, 209, 36 L.ed. 943, 945, 13 Sup. Ct. Rep. 44."

If, as petitioner Coy Burnett contends, the attachment herein was null and void because the bond was defective under the controlling statute—Article 279 Rev. Civ. Stat. Texas—then the trial court was completely without jurisdiction to make and enter its judgment (R. 167-170) foreclosing such attachment lien.

Since the Court was without jurisdiction to make such order, the order took petitioner Burnett's property without due process of the law, and equal protection of the laws.

> *Pennoyer v. Neff,* 95 U.S. 714 24 L.ed. 565 (1877); *National Licorice Co. v. National Labor Rel. Board,* 309 U. S. 350, 362, 84 L. ed. 799, 809 (1940).

As the Court said in *Kroese v. General Steel Castings Corp.,* 179 F. (2d) 760 (CA 3rd 1950), cert. den. 339 U. S. 983, 94 L.ed. 1386: (p. 763)

> "It is hornbook law that there must be personal jurisdiction over an individual who is to be bound by a judgment at law or a decree in equity. The proposition is too elementary, too well settled to require us to display learning in citing authorities for its support."

Particularly appropriate here is the case of *Hess v. Pawloski,* 274 U. S. 352, 71 L. ed. 1091 (1927), where the court said: (pp. 355-356)

"The process of a court of one state cannot run into another and summon a party there domiciled to respond to proceedings against him. Notice sent outside the state to a nonresident is unavailing to give jurisdiction in an action against him personally for money recovery. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. There must be actual service within the state of notice upon him or upon some one authorized to accept service for him. *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559. A personal judgment rendered against a nonresident who has neither been served with process nor appeared in the suit is without validity. *McDonald v. Mabee*, 243 U. S. 90, 61 L. ed. 608, L.R.A. 1917F, 458, 37 Sup. Ct. Rep. 343. The mere transaction of business in a state by nonresident natural persons does not imply consent to be bound by the process of its courts. *Flexner v. Farson*, 248 U. S. 289, 63 L. ed. 250, 39 Sup. Ct. Rep. 97. The power of a state to exclude foreign corporations, although not absolute but qualified, is the ground on which such an implication is supported as to them. *Pennsylvania F. Ins. Co. v. Gold Issue Min. Co.* 243 U. S. 93, 96, 61 L. ed. 610, 616, 37 Sup. Ct. Rep. 344. But a state may not withhold from nonresident individuals the right of doing business therein. The privileges and immunities clause of the Constitution, §2, art. 4, safeguards to the citizens of one state the right 'to pass through, or to reside in any other state for purposes of trade, agriculture, professional pursuits, or otherwise.' And it prohibits state legislation discriminating against citizens of other states. *Corfield v. Coryell*, 4 Wash. C.C. 371, 381, Fed. Cas. No. 3,230; *Ward v. Maryland*, 12 Wall. 418, 430, 20 L. ed. 449, 452; *Paul v. Virginia*, 8 Wall. 168, 180, 19 L. ed. 357, 360."

(2) Even If the Trial Court Had Jurisdiction to Enter an In Rem Judgment Against the Attached Property, Its Judgment, as Worded was In Personam and Hence Exceeded Its Jurisdiction.

The judgment in this case recited that: (R. 168)

> " . . . defendant Coy Burnett . . . is justly indebted to the plaintiffs in the sum of eighty thousand dollars . . . "

While the judgment went on to authorize foreclosure of the attachment lien and sale of the attached property: (R. 170)

> " . . . to satisfy the above described indebtedness of defendant Coy Burnett . . . "

it nowhere *limited* or *restricted* the judgment to the attached property or to "so much of" the attached property as was necessary to satisfy the indebtedness. Under the circumstances (no service and no appearance by non-resident defendant) such a personal judgment was void, and violated due process of law, as shown by the authorities cited in (1) above.

II. The Decision of the Court Below was in Error in Approving the Trial Court's Refusal to Instruct the Jury on the Law of Estoppel, Where Estoppel was Pleaded as an Affirmative Defense, the Evidence on the Issue was Conflicting, the Issue was Not Covered by the Court's Other Instructions, and the Instructions Requested were Proper Statements of the Law.

The trial court's charge to the jury was a mandate to return a verdict for the "reasonable value of the services."

(R. 159.) The jury could well find (and probably did) that the evidence of respondents' failure to "shoot square" with the client was to be completely disregarded as inconsequential.

A. The Decision of the Court Below Is in Conflict with the Applicable Decisions of this Court.

In approving the trial court's refusal to instruct as to petitioners' pleaded affirmative defense of estoppel, the court below was in conflict with this Court's long established rule that a defendant is entitled to a correct charge on the law applicable to his special defense, and failure to give it is prejudicial error.

As the Court said in *Raney v. Barlow*, 112 U. S. 207, 28 L. ed. 662 (1884): (p. 665 L. ed.)

> "We think there was error in the charges complained of. To test their correctness we must assume the truth of the facts which the testimony submitted to the jury tended to prove. It was the duty of the court to submit to the consideration of the jury the testimony adduced by the defendant to sustain the defenses set up in his answer, and the charge should have been based on the hypothesis that the defenses which the testimony tended to prove were proven."

In the case of *Merchants' Mutual Ins. Co. v. Baring*, 87 U.S. 159, 22 L.ed. 250 (1874) the Court stated: (p. 251 L.ed.)

> "Correct instructions, if applicable to the case, the court, as a general rule, is required to give, unless the same are in substance and effect embodied in those previously given by the court to the jury; . . ."

B. The Decision of the Court Below Is in Conflict with Decisions in the Second and Ninth Courts of Appeal and Its Own Earlier Decision Holding that the Question of Whether or Not an Estoppel Exists Is for the Jury Under Proper Instructions.

Illustrative of the cases from the other circuits is the case of *Franklin v. Meredith Co.*, 64 F. (2d) 109 (CCA 2d 1937), holding that estoppel is a factual question to be determined by the jury under appropriate instructions. As the Court said: (p. 112)

> " . . . the appellant . . . was entitled to have this question (estoppel) submitted to the jury . . ."
> "For this error, the judgment must be reversed . . . "

The trial court's refusal to instruct the jury on the law of estoppel in this case was therefore clear and prejudicial error.

C. Such Determination of an Important Texas Question Is in Conflict with Texas Law Regarding the Submission of Properly Pleaded Estoppel to the Jury by Special Instruction.

In *Gulf C. & S. F. Ry. Co. v. Gorman*, 112 Tex. 147, 245 S. W. 418, (1922), the Court stated the general Texas rule as follows: (p. 419)

> ". . . It is the well-settled law of this state that every question of fact material to the defendant's defense as pleaded, and which finds support in conflicting evidence, should, upon request, be submitted to the jury for their determination . . ."

In *Sanger Bros. v. Trammell*, (Tex. Civ. App. 1917), 198 S. W. 1175, the Court applied the general rule to an estoppel defense, stating: (p. 1177)

> " . . . In view of such evidence, we are of the opinion that under the authorities noted, the court erred in refusing to submit to the jury by appropriate instructions plaintiffs' plea of equitable estoppel: . . . "

D. The Decision of the Court Below Is in Conflict with Decisions by the Second, Fourth, Sixth, Seventh, Eighth and Ninth Courts of Appeal and the Court of Appeals for the District of Columbia.

The cases from the other Circuits are clear that failure to submit a special defense to the jury after a proper, timely request amounts to prejudicial error.

Illustrative of the decisions in the other Circuits is *Chicago & N. W. Ry. Co. v. Green*, 164 F. 2d 55 (CCA 8th 1947). There, the defendant requested an instruction on its defense of unavoidable accident which was denied. The case was expressly reversed on this ground, the Court saying. (pp. 61, 63)

> "The requested instruction sought to expressly put before the jury defendant's theory of the accident and to apply concretely to that theory, if the jury accepted it, the test for determining defendant's liability in the situation . . . "
>
> "We think the refusal of the court to give the requested instruction, either in its tendered form or in a restatement of its material substance, was error. It has long been the rule that, as against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of the case, if there is evidence

to support it and if a proper request for such an instruction is made. . . . "

" . . . In fact, even a request for an instruction which is not entirely perfect may in some situations impose upon the court the duty to give a more specific instruction on a particular issue, where it soundly appears that such an instruction is needful to enable the jury to intelligently determine the question. . . ."

In *Pfotzer v. Aqua Systems,* 162 F. 2d. 779 (CCA 2d 1947) involving an action for treble damages for conspiracy to restrain competition, plaintiff's counsel requested detailed instructions on the law on monopoly which the court refused, reading only portions of the statute. Judge Learned Hand stated in reversing: (p. 783)

". . . The plaintiff's requests, though by no means models, called his attention to this position clearly enough to require, if not his acceptance of their clumsy verbiage, at least some plainer statement of the issue than he had given."

In *United States v. Messinger,* 68 F. (2d) 234 (CCA 4th 1934), the Court held: (p. 237)

". . . Having charged at length upon the theory of plaintiff and the law applicable thereto, he should have charged upon the principles applicable to the defense of the government."

In *Klas v. Yellow Cab Co.,* 106 F. 2d 935 (CCA 7th 1939) the Court held: (p. 937)

"What is the proximate cause of an injury is ordinarily a question of fact, to be considered by the jury from all the attending circumstances, and both parties may have their factual theories submitted to the jury.

"The judgment is reversed and the cause remanded for a new trial, because of the refusal to give defendant's requested instruction on the theory of its defense."

In *Alaska Airlines v. Oszman*, 181 F. 2d 353 (CA 9th 1950), the Court held: (p. 353)

"It is of course true that the theories of the parties to a court action should be given the jury by way of instructions or charge. . . ."

In *Montgomery v. Virginia Stage Lines*, 191 F. 2d 770, (C.A. D.C. 1951), the Court held: (p. 772)

" '. . . It has long been the rule that as against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of the case, if there is evidence to support it and if a proper request for such an instruction is made . . .' *Chicago & N. W. Ry. Co. v. Green*, 8 Cir., 1947, 164 F. 2d 55, 61; see also, *Cobb v. Capital Transit Co.*, 1945, 79 U.S. App. D.C. 364, 148 F. 2d. 217; *Feldmann v. Connecticut Mut. Life Ins. Co.*, 8 Cir. 1944, 142 F. 2d. 628, 631. Though the requests were not entirely correct as instructions on the case as a whole, the gist of them was sufficiently important and clear to require their substance to be given.

'While a party may not complain of the refusal of a requested instruction which does not correctly state the law, the court being under no obligation to reframe a request so as to contain an accurate statement of law, yet where, as here, the meaning of a request is reasonably apparent, and its subject matter is important and not sufficiently covered by the general charge, a court would not be justified in ignoring the request merely because susceptible of such an interpretation as to make its proposition not absolutely accurate. . . .' *Rothe v. Pennsylvania Co.*, 6 Cir., 1912, 195 F. 21, 35; to like effect are *E. I. Du Pont De Nemours & Co. v. Frechette*, 8 Cir., 1947, 161 F. 2d 318, 323; *Pfotzer v. Aqua Systems*, 2 Cir., 1947, 162 F. 2d 779, 783; and *Chicago & N.W. Ry. Co. v. Green, supra.*"

E. The Decision of the Court Below Is in Conflict with Its Own Decision in Paramount Film Distributing Corp. v. Applebaum, 217 F. (2d) 101.

In *Paramount Film Distributing Corp. v. Applebaum*, 217 F. (2d) 101 (CA 5th 1954), the Court said: (p. 123)

> "In a proper case, a party may be entitled to have his theory submitted to the jury, when there is evidence to support it and a proper request therefor has been made . . . and when the judge instructs as to one party's theory, he should also instruct as to the other party's contentions . . ."

F. The Decision of the Court Below Sanctioned the Trial Court's Departure from the Accepted and Usual Course of Judicial Proceedings.

The decision of the Court below sanctioned the District Court's departure from the accepted and usual course of judicial proceedings, in refusing to charge the jury specially upon a properly pleaded estoppel, for which there was some evidence in the record, and thus effectively denied appellant of a jury trial upon this crucial issue—a denial of jury trial under the Seventh Amendment, and due process, representing substantial error.

Illustrative of the importance of jury trial and the consequent seriousness of error of improperly withdrawing issues from the jury is the recent case *City of Morgantown, W. Va. v. Royal Ins. Co.*, 337 U.S. 254, 93 L.ed. 1347 (1949), where the Supreme Court said: (p. 258)

> ". . . Denial of the right in a case where the demanding party is entitled to it is of course error. The rulings of the district courts granting or denying jury trial are subject to the most exacting scrutiny on appeal."

Failure to charge on the law of estoppel withdrew this issue from the jury and precluded their proper consideration of petitioners' evidence. In *Baltimore & Ohio R. Co. v. U. S.*, 298 U. S. 349, 80 L. ed. 1209 (1936) the court said: (pp. 368-369)

> ". . . The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it."

The summary disposition by the Court below of the issue of estoppel (Appendix, p. 13), without supporting authorities ignored the undisputed evidence that a confidential relationship of attorney and client existed before April 20, 1951 (Defendants' Ex. 7, R. 584, 586); that on May 21, 1951 Burnett proposed that a fee like the trial court fee of $7,500.00 each paid appellee Graves and Kleberg firms, would be reasonable for the desired result (Defendants' Ex. 8) and that appellee Graves replied that such proposal was considered fair and reasonable by him and the Kleberg firm, as well as other substantial evidence of estoppel. (Appendix, p. 22, supra).

The Court also said: (Appendix, p. 14)

> "There is no evidence which even raises a suspicion of unprofessional conduct or breach of their highest duty as counsel."

The Canons of Professional Ethics of the American Bar Association provide:

> "11. The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client. . . . "

> "12. . . . In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade."

Petitioners submit that in its anxiety to substitute itself for the jury denied by the District Court on this issue, the Court overstated its construction of the facts. Regardless of the Fifth Court's opinion as to whether or not the facts established the pleaded affirmative defense of estoppel, there was enough evidence on the issue to go to the jury under proper instructions.

III. The Decision of the Court Below Is in Conflict with the Rule in the Sixth Circuit That Where a Separate Employment of Attorneys Exists, the Award of a Joint Fee Is Improper.

The Court below approved the trial court's refusal to give a timely requested instruction requiring the jury to fix the reasonable value of each respondent attorney's services (R. 154-156). The trial court instead instructed the jury to determine the "reasonable value of the services . . . of plaintiffs (Respondents here) for defendants . . . " (R. 159). The jury returned such a lump sum verdict for $80,000 in favor of all plaintiffs against both defendants. (R. 159)

On this clear record, the decision of the Court below is in conflict with the case of *Glidden v. Gowen,* 123 F. 48 (CCA 6th 1903) involving the question of the amount of compensation three attorneys were to receive for their services in favor of a common client. The matter was referred to a master for determination who found a "reasonable" fee for all attorneys was $51,892. On appeal, the

Court held that the amount of the fee was to be determined by the value of individual services rendered. The Court stated: (p. 50)

> "It is not shown, nor is it contended, that Mr. Glidden, Mr. Little, and Mr. Whittaker were in fact partners or had any agreement among themselves, or with the trustees, that they should be regarded as partners in the conduct of the litigation in which they were employed. *It was the common case of the employment of several counsel, not otherwise associated, in a case without any agreement except that implied to pay them each such sum as their services should reasonably deserve.* The master was clearly in error in adopting the theory proposed to him that those counselors should be treated as partners, and therefore entitled to share equally in a gross sum to be awarded to the partnership—an error which may have seriously disturbed in the sequel the proportionate sums which are to be allowed to counsel . . ." (Italics added)

As discussed in the Statement, it is undisputed that the employment of the various respondent attorneys was separate and not joint. The respondents themselves pleaded separate employment (R. 12) and the respondent Kleberg firm's services were valued by them at only $7,500—about 10% of the verdict, (R. 441) while the services of another respondent Kendall, were worth only $500.00, or $12.50 per hour for his work in the trial court. (Plts.' Ex. 7.) In view of the very high verdict of $80,000 and the small proportion of such verdict reasonably ascribable to the services of all respondents except Graves, the error of the trial court in refusing to require the jury to separately evaluate the services of each respondent attorney was prejudicial.

IV. The Opinion of the Court Below Approving the Trial Court's Withdrawal of Relevant Income Tax Evidence From the Jury was in Error on the Following Grounds:

A. Such Determination Is in Conflict with the Long Settled Rule in This Court and Lower Federal Courts That It Is Error for the Court to Withdraw from the Jury's Consideration Any Evidence Tending to Establish Material Facts.

As the Court said in *Fresh v. Gilson,* 16 Pet. (U. S.) 327, 10 L.ed. 982 (1842): (p. 335)

> " . . . It was certainly competent for the parties to use such evidence, and to rely upon its effect before the jury. The first instruction . . . cuts off from the plaintiff at least all benefit of such evidence, however strong it might have been. In this we consider that instruction as having deprived the plaintiff of an undoubted legal right. We regard it, therefore, as erroneous; . . ."

In *McCandless v. U. S.,* 298 U.S. 342, 80 L.ed. 1205 (1906) the trial court refused to admit certain evidence and rejected an offer of proof. The Supreme Court held this to be error, stating: (p. 346)

> " 'All that the Court can ask is, that the particular evidence offered conduces to establish any one proposition involved in the issue. . . . There must be a starting point somewhere, and the Court should never reject evidence merely because, unaided by other testimony, it is insufficient, if it tend legally to prove any part of the case.' "

This rule has been followed by the circuit courts. In *Home Ins. Co. v. Consolidated Bus Lines,* 179 F. 2d 768 (CCA 4th 1950), the court said: (p. 773)

"... 'The trial judge may, of course, express an opinion upon the facts; but he may not withdraw material evidence from the consideration of the jury;' ..."

In this case, one of the primary issues directly before the jury was the amount of the benefit conferred on Burnett by respondents' services (R. 15, 16, 160). Petitioners' evidence tended to establish the impact of income taxes, (R. 541) and the resulting net benefit. The trial court's peremptory charge to the jury to disregard income taxes (R. 160), was in effect, a charge to unreservedly accept the valuation of the benefit by respondents' sole witness. (R. 250)

It is petitioners' contention that a party is entitled to have the jury consider all of the evidence properly before them in arriving at their verdict, and any instruction which withdraws from their consideration any evidence, however weak, tending to establish a material fact, is erroneous.

While the trial court and Court of Appeals probably were convinced that petitioners' evidence regarding the diminution of the benefit to the client, Burnett, (by reason of income taxes), was of slight probative value, the fact remains that it was relevant, competent evidence on that issue before the jury. (R. 541, Defts.' Ex. 13.) Respondents' case was based upon an asserted $2,000,000 benefit or enhancement. Petitioners' evidence, if credited by the jury, would reduce this by two-thirds—a reduction so great as to constitute a failure in proof as to this issue by respondents. Such evidence bore directly upon Special Issue No. 1(c) (R. 169), and yet the trial court charged the jury to disregard it. (R. 160.) This was plain and prejudicial error. In addition, the Court of Appeals held that aside from petitioners' failure to object to the with-

drawal of the income tax issue, there was inherently no merit in petitioners' position that income taxes are judicially recognized to be an element of necessary cost. Despite the fact that petitioners did not complain to the trial court of this error, it is so plain as to command correction. This is doubly true when it is added to the other errors complained of herein.

The universal acceptance of the impact of income taxes upon the "willing buyer—willing seller" valuation concept is reflected by General Counsel Memorandum 45, 1 C. B. 65 where it is stated: (Article 201)

> "Effect may be given to future Federal taxes in the determination of the values of assets when such values must be established by appraising expected future earnings.
>
> . . .
>
> A. W. Gregg
> General Counsel
> Bureau of Internal Revenue"

B. Such Determination Is in Conflict with the Principle that Income Tax Evidence Is Relevant to Valuation of Property as Declared by the Seventh Court of Appeals.

In *International Hotel Co. v. Libbey,* 158 F. (2d) 717 (CCA 7th 1946), the Court held: (p. 720)

> " . . . We know judicially that the plaintiff may have to pay Federal income and excess profits taxes. . . . They are as much an ordinary and necessary expense as the property tax . . ."

C. Such Determination Deprived Petitioners of Due Process of Law.

The trial court withheld relevant competent evidence from the jury. This deprived petitioners of the full hearing required by due process.

In *Georgia R. & Electric Co. v. Decatur*, 295 U. S. 165, 79 L. ed. 1365 (1935), the Court said: (p. 171)

> ". . . Certainly, competent proof tending to overcome a rebuttable presumption of material fact cannot be immaterial; and the refusal of a court to receive or consider any proof whatever on the subject amounts to a denial of a hearing on that issue, in contravention of the due process of law clause of the Constitution."

In *Washington ex. rel. Oregon R. & N. Co. v. Fairchild*, 224 U.S. 510, 56 L.ed. 863 (1911), the Court said: (p. 524)

> ". . . The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen, *but to give legal effect to what has been established.*" (Italics added.)

E. Attachment Bond (Original Exhibit #2, 2/24/54, Graves et. al. v. Burnett, et. al., Fifty-Third District Court of Travis County, Texas, Case No. 98542).

FILED Feb. 24, 1955
HARVEY HART, Clerk
J. E. STEINER, Deputy
IN THE FIFTY-THIRD DISTRICT COURT OF

TRAVIS COUNTY, TEXAS
No. 98542

IRELAND GRAVES, ET AL.	)
vs.	)
COY BURNETT and MEL DAR CORPORATION	)

ATTACHMENT BOND

THE STATE OF TEXAS,
County of Travis

We, the undersigned, Ireland Graves, J. Chrys Dougherty and Joe R. Greenhill, individually and as members of the partnership practicing law under the firm name of Graves, Dougherty & Greenhill; Edward R. Kleberg, John A. Mobley, Leslie S. Lockett, M. Harvey Weil and John Patrick McGloin, individually and as members of the partnership practicing law under the firm name of Kleberg, Mobley, Lockett & Weil; and Gaynor Kendall; as Principals, and the undersigned surety company, as Surety, acknowledge ourselves bound to pay to Coy Burnett the sum of Two Hundred Thousand Dollars ($200,000.00), conditioned that the above bound plaintiffs in attachment against the said Coy Burnett, defendant, will prosecute their said suit to effect and that they will pay all such damages and costs as shall be adjudged against them for wrongfully suing out such attachment.

WITNESS our hands this 17th day of May, 1954.

IRELAND GRAVES
Ireland Graves
J. CHRYS DOUGHERTY
J. Chrys Dougherty
JOE R. GREENHILL
Joe R. Greenhill
Individually and as members of the partnership practicing law under the firm name of Graves, Dougherty & Greenhill.

Filed in the 53rd District
Court of Travis County, Texas
at 4:33 P. M.
MAY 17 1954
O. T. Martin, Jr., District Clerk
By JAMES FLETCHER
Deputy

EDWARD R. KLEBERG
Edward R. Kleberg
JOHN A. MOBLEY
John A. Mobley
LESLIE S. LOCKETT
Leslie S. Lockett
M. HARVEY WEIL
M. Harvey Weil
JOHN PATRICK McGLOIN
John Patrick McGloin
Individually and as members of the partnership practicing law under the firm name of Kleberg, Mobley, Lockett & Weil
GAYNOR KENDALL
Gaynor Kendall
PRINCIPALS

AETNA CASUALTY & SURETY COMPANY
By JOHN CHILES, JR.
Its Attorney in Fact
SURETY

SEAL

May 17, 1954. Approved & Filed
O. T. MARTIN, JR.
Dist. Clerk.

THE AETNA CASUALTY AND SURETY COMPANY
Hartford, Connecticut
Limited Power of Attorney

KNOW ALL MEN BY THESE PRESENTS, That *The Aetna Casualty and Surety Company*, a corporation organized under the laws of the State of Connecticut, and having its principal office in the City of Hartford, State of Connecticut, hath made, constituted and appointed, and does by these presents make, constitute and appoint

JOHN H. CHILES, JR.

of

its true and lawful attorney(s) with full power and authority hereby conferred to sign, execute and deliver for it, in its name and on its behalf, as Surety, one and only one bond, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or conditional undertaking as described hereinbelow in this Power of Attorney: Attachment bond in the amount of $200,000.00 on behalf of Graves and Dougherty; Kleberg, Mobley, Locket and Weil; Gaynor Kendall.

and to bind *The Aetna Casualty and Surety Company* thereby as fully and to the same extent as if the same were signed by the duly authorized officers of *The Aetna Casualty and Surety Company*, and all the acts of said attorney(s) pursuant to the authority herein given, are hereby ratified and confirmed.

IN WITNESS WHEREOF, *The Aetna Casualty and Surety Company* has caused these presents to be signed by its Resident Vice-President, and its corporate seal to be hereto affixed, this 5th day of May, A.D. 1954.

The Aetna Casualty and Surety Company.

By

TRAVIS BAILEY

Resident Vice-President.

STATE OF TEXAS,

County of Bexar,—ss.:

On this 5th day of May, A. D. 1954, before me personally came Travis D. Bailey, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of San Antonio, State of Texas; that he is Resident Vice-President of *The Aetna Casualty and Surety Company*, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by authority granted him by the certificate thereof which appears upon the reverse hereof; that he signed his name thereto by like authority.

TRAVIS A. YANCEY

Notary Public.

TRAVIS A. YANCEY

Notary Public, Bexar County, Texas

SEAL

Power No. 432011

KNOW ALL MEN BY THESE PRESENTS, That *The Aetna Casualty and Surety Company*, a corporation duly organized under the laws of the State of Connecticut, and having its principal office in the City of Hartford, County of Hartford, State of Connecticut, does hereby authorize and empower the following named person or persons respectively:

Travis D. Bailey,

of San Antonio, Texas

as Resident Vice-President of *The Aetna Casualty and Surety Company*, by his sole act to sign, execute and deliver on behalf of *The Aetna Casualty and Surety Company*, unto such person or persons as he may select, its Power of Attorney, constituting and appointing each such person its Attorney-in-Fact, with full power and authority to make, execute and deliver for it, in its name and on its behalf, as Surety, one and only one bond, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or conditional undertaking as described in each instance in each such Power of Attorney.

This grant of authority is made under and by authority of the following provisions of the by-laws of the Company which provisions are now in full force and effect and are the only applicable provisions of said by-laws:

ARTICLE IV—Section 9.

The President, any Vice-President, or any Secretary may from time to time, by certificate in writing executed and delivered by him on behalf of the Company, authorize and empower any Resident Vice-President to execute and deliver on behalf of the Company to such person or persons as such Resident Vice-President may select, a Power of Attorney constituting and appointing each such person the Company's Attorney-in-Fact with full power and authority to make, execute, and deliver for it, in its name and on its behalf, as surety, one and only one bond, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or conditional undertaking as described in each such Power of Attorney.

IN WITNESS WHEREOF, *The Aetna Casualty and Surety Company* has caused this instrument to be signed by its Secretary, and its corporate seal to be hereto affixed, this 5th day of May, A. D. 1954.

The Aetna Casualty and Surety Company.
By J. A. SWEARINGEN
Secretary.

SEAL

STATE OF CONNECTICUT,
County of Hartford,—*ss.*:

On this 5th day of May, A. D. 1954, before me personally came J. A. SWEARINGEN, to me known, who, being by me duly sworn, did depose and say: that he is Secretary of *The Aetna Casualty and Surety Company*, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by authority of his office under the by-laws of said corporation and that he signed his name thereto by like authority.

EMMA L. LATIMER
Notary Public.

SEAL

My Commission Expires Mar. 31, 1956

F. EXHIBITS

1. Plaintiffs' Exhibits 7, 8, 9, 25, 31, 48, 49, 50

a. Exhibit 7

GRAVES, DOUGHERTY & GREENHILL
Box 1123
Austin 66, Texas
May 17, 1951

Mr. Coy Burnett
643 South Olive Street
Los Angeles 14, California

Dear Mr. Burnett:

Enclosed please find a statement covering attorneys' fees in the Mar-Tex case at Corpus Christi. In view of your suggestion at the time we were employed, I enclose a diary indicating the time devoted to the case.

I have agreed to pay Koch and Kendall (see diary memo enclosed) $500.00 each. I thought that it would be fair to suggest a fee of $7,500.00 for my firm and an equal amount for the Lockett & Weil firm. If you approve the items totaling $1,000.00 for Koch and Kendall, you may send checks payable to them for $500.00 each; ($12.50 per hr.) or, if you prefer, you may send check for $8,500.00 payable to my firm, and I will pay them. If you do not approve their employment and think that I should absorb it, you may eliminate the item.

The amounts suggested may be regarded as payment in full for services to date, or as payment on account of fees to be agreed upon, as you may prefer.

If for any reason you think that the amounts suggested are excessive, we should welcome your frank comments and would be glad to discuss it with you. I have talked

with Lockett & Weil, and we have tried to suggest what we think is fair, but there is no inflexible yardstick by which to arrive at the exact amount.

We plan to submit to Judge Martineau a brief on the contract question, in support of motion for new trial.

With best regards, I am

Sincerely yours,
IRELAND GRAVES

IG:ej
Enclosure
CC - Kleberg, Mobley, Lockett & Weil
Jones Building, Corpus Christi, Texas
P.S.: I will send later a bill for expenses.

I. G.

Graves Diary

Friday, April 20, 1951—Arrived Corpus Christi 11:00 a.m. by plane. Conferred with Burnett, Spice & Tarlton

Saturday, April 21—At noon negotiations with Tarlton ended. Conferred with Burnett, Spice & Lockett until about 8:30 p.m.

Sunday, April 22—Noon returned to Austin by plane

Monday through Friday, April 23 - 27th—In office at Austin worked on Mar-Tex case one-half time (estimated) —2½ days. Drove to Corpus Christi Friday p.m.

Saturday, April 28—All day until 8:00 p.m. wth Lockett & Weil in their office

Sunday, April 29—All day with Lockett; Burnetts arrived from California. P.M. Spice and Weil returned from Shamrock Island

Monday, April 30—A.M., selected jury. P.M., Walker argued exceptions

Tuesday, May—Replied to Walker argument on exceptions; Lewright rebuttal. Exceptions based on Mecom case overruled Tuesday p.m.

Wednesday, May 2—All day preparing pleadings and for argument on motion to strike

Thursday, May 3—A.M. Weil argued, opposing motion to strike enhancement. P.M. read pleadings to jury.

Friday, May 4—A.M. Graves made opening statement to jury. Testimony began with Wheeler and French Smith. Court recessed Friday p.m. until Monday.

Saturday, May 5—All day in office with Lockett and Weil

Sunday, May 6—In office in a.m.; with Spice and Weil in p.m.

Monday, May 7—A.M. resumed Wheeler testimony. P.M. worked through at courthouse on stipulation re cost of improvements and operations, until 9:45 that night.

Tuesday, May 8 through Friday, May 11—Testimony in court; both rested

Saturday, May 12 and Sunday May 13, until 5:00 p.m.—In office with Lockett and Weil

Monday, May 14—A.M. in office on motion for instructed verdict. 11:00 a.m., plaintiff's admission filed eliminating "good faith" issue.

Jury discharged. Court made following entry:

"Judgement announced for plaintiff for recovery of leasehold estate with recovery granted in behalf of defendant and/or intervener, Mel Dar Corporation for stipulated amount of permanent improvements, and with recovery for plaintiff for oil runs with offset granted in favor of defendant and/or intervener for operating costs; all as per decree to be filed."

Court requested counsel to have draft of judgment ready by Monday, May 28th.

Lockett and Weil - Time

Lockett first conferred with us on Saturday P.M., April 21st, and has devoted full time to the case thereafter. Weil

began work on the case on the following Wednesday morning, May 2nd. Since then, until May 14th, both of them have worked all day and nearly every night. Graves' dairy supplies details.

Graves, Dougherty & Greenhill
Office Time at Austin

Greenhill - 85 hours day; 41 hours night and Sundays
Dougherty - 25 hours day; 6 hours night

In addition Graves employed two outside lawyers of Austin to brief two phases: Walter R. Koch on enhancement or other measure of recovery for improvements, and on related questions arising on second phase of case. Gaynor Kendall (who teaches the course in Contracts in University of Texas Law School) on the contract issue. They have furnished a time sheet showing 41 hours and 39½ hours respectively.

b. Exhibit 8

AIR MAIL

May 21, 1951

Judge Ireland Graves
Graves, Dougherty & Greenhill
Box 1123
Austin 66, Texas

Dear Judge:

Answering your letter of May 17th I do think the fees are on the top side, particularly in view of the fact, as you know, I feel that the merits of the case have not been presented to the trial court as yet. That is, the court has never, except from the witness stand at this time had any reason to understand what I regard as a conclusive effect of the writings.

I am not underestimating the insurance to the venture which resulted from the hearing.

I would like, however, to know how many years of profit are going to be absorbed in the attorneys' fees as my 40% is already hypothicated for several years. Would it not be reasonable to allow these fees to cover everything except the work involved upon appeal. I am starting this attorney's fees matter through my interested experts for their reports but I will, of course, do as I always do, weigh and apply their opinions to the record in the manner which convinces my judgment.

If you could agree for the attorneys involved to let this payment cover everything except the appeal, which is certain to occur by plaintiff or defendant without regard to whether at long last Judge Martineau is made to understand the writings and the law applicable, I think this would be the satisfactory way to approach it.

If, as I think is possible, the presentation of the letters and the law and the record showing a failure of plaintiff to comply with the condition preceding were carried to a point that both the trial court and plaintiff's attorneys were convinced, and no appeal were taken by plaintiff, I should be willing to consider a further fee in substantially the amount you and the Kleberg firm have tendered.

I, of course, approve your employment of the attorneys in Austin and will continue to do this in future matters handled for me when you deem it necessary.

In other words, I like to generally rely on a leader who gets results and I think you know how to get them.

Yours very truly

Coy Burnett:af

c. Exhibit 9

GRAVES, DOUGHERTY & GREENHILL
Box 1123
Austin 66, Texas
May 24, 1951

Mr. Coy Burnett
643 South Olive Street
Los Angeles 14, California

Dear Mr. Burnett:

I have your letter of the 21st instant in reply to mine of the 17th about the attorney's fees.

I have talked with the Corpus Christi counsel, and we think that your counter suggestions are entirely reasonable and fair.

Lockett advised me today that Lewright had sent a draft of judgment to Walker but he had not received Walker's reply.

Lockett is at work on the motion for new trial, and I am working on a brief. If we can get up a fairly satisfactory brief it is my suggestion that we have it printed, and deliver it to Judge Martineau in printed form. This would at least suggest to him that we consider the matter of sufficient importance to present it to him in the most readable form. The printing expense would run $2.00 per page. I do not think that this is essential, but I suggest it for your consideration.

I think Judge Martineau will find that he will have great difficulty in writing a judgment for plaintiff, whereas it would be a simple matter to write a judgment for defendant.

Sincerely yours,
IRELAND GRAVES

IG:ej

d. Exhibit 25

GRAVES, DOUGHERTY & GREENHILL
Box 1123
Austin 66, Texas
December 28, 1952

Mr. Coy Burnett
643 South Olive Street
Los Angeles 14, California

Dear Mr. Burnett:

On the assumption that you may prefer to pay this year part of the expense of defending the Mar-Tex suit we have attempted to arrive at a figure to suggest to you to cover the attorneys' fees on appeal. It is hardly necessary to say to you that we have no formula that will enable us to say with assurance that the fee should be a given amount, no more and no less. We know in general, as you do, the factors that should be taken into account.

Considering these, it seems to us that it is more nearly correct to say that a range, rather than an absolute amount, is indicated. On that basis our figures run from $75,000.00 to $100,000.00.

It goes without saying that if you think that these suggestions are out of line, we should be glad to discuss the matter with you.

This letter is not intended as a request for immediate payment of any or all of the fee. Indeed, to the extent that it may be deferred until next year without added tax burden to you, we should prefer to have it deferred. Naturally, we do not request that this be done if it would impose avoidable burdens upon you. It occurred to us that to the extent of Mel-Dar's part, it could without inconvenience be carried into 1953.

It has been a great pleasure to represent you, and we appreciate your fine co-operation throughout. We desire to conclude the fee matter in a way that leaves you entirely satisfied.

Sincerely yours,
IRELAND GRAVES

IG:ej

e. Exhibit 31

C O P Y

JOSEPH T. ENRIGHT
Attorney at Law
541 South Spring Street
Los Angeles 13
MIchigan 3827
March 13, 1953

Ireland Graves, Esq.
Graves, Dougherty & Greenhill
Box 1123
Austin 66, Texas

Dear Mr. Graves:

Reference is made concerning Mr. Coy Burnett's letter of March 12, 1953. My being daily engaged in the trial of an action against Reconstruction Finance Corporation for the Monolith Midwest Company during the period November 5, 1952 to March 5, 1953, has prevented my being more familiar with the Burnett interests' legal matters pending in Texas.

My understanding is that there are two court cases requiring attention, both involving questions pertaining to the title to 22 acres. The State of Texas being plaintiff in one case and the Atlantic Oil plaintiff in the other case; one case pending at Corpus Cristi and the other at Austin.

I further understand that a decision in either case will result in an adjudication of both cases and that the Atlantic action, by agreement of counsel, is abated until the State complaint is adjudicated.

This weekend I will review the pleadings to confirm the above and better understand the issues. Presently, I am uncertain as to the Kleberg firm's status. As counsel for the Burnett interests it is my desire that yours and the Kleberg firm continue the representation of the Burnett interests as requested from time to time and in the above pending litigation upon the following fee schedule:

Court appearances at the rate of $100.00 per full court day; appearances requiring one-half day or less at the rate of one-half of the court full day per diem; office services for chief counsel at the rate of $10.00 per hour; and, for assistants to chief counsel, the rate of $6.50 per hour.

In the RFC litigation an issue pertaining to attorneys' fees arose and the evidence revealed RFC special and assistant trial counsel were being paid at these rates which is in line with the rates being paid by Monolith for other counsel, including myself.

I am hopeful of working out of the pressure of the RFC matter within the next few weeks at which time I will review the Mar-Tex fee matters referred to in Mr. Burnett's letter. Advise at your earliest convenience in the event the foregoing arrangement is not acceptable.

Very truly yours,
JOSEPH T. ENRIGHT

JTE:s

f. Exhibit 48

GRAVES, DOUGHERTY & GREENHILL
Box 1123
Austin 66, Texas
March 27, 1953

Mr. Joseph T. Enright
541 South Spring Street
Los Angeles, California

Dear Mr. Enright:

In your letter of March 13, you have correctly stated that there are two court cases pending in Texas against Mr. Coy Burnett, and involving interests of Mel-Dar Corporation. One is pending in the District Court of this (Travis) County, and the other in the District Court of Nueces County, at Corpus Christi.

The suits arose in this way.

The field rules promulgated by the Texas Railroad Commission for the Mustang Island Field (in which Shamrock Island is situated) provide for drilling units of 40 acres, for each separate producing zone.

On Shamrock, Mr. Burnett has drilled three wells in Zone 8, the 6800′ sand, and one well in Zone 6, the 7650′ sand. We think that the Island contains approximately 158 acres, and if that is correct Mr. Burnett is entitled to drill a fourth well into Zone 8. He applied to the Commission for a permit to drill well No. 5 (the 4th well in Zone 8), and in support of the application he attached a plat showing 158 acres within the Island.

At the hearing of the application the Atlantic Oil and the State of Texas (through the legal adviser to the Land Commissioner) appeared in opposition. The State ac-

tually made no formal protest, since its interests were protected by the protest made by its lessee, the Atlantic.

They contend that a triangular shaped area of about 21 acres at the east end of the island, although it was originally within the land described in the patent from the State, has become submerged by gradual encroachment of the waters of the bay, and that the title to this submerged area has reverted to the State. If so, it is within the oil and gas lease held by the Atlantic.

The enclosed transcript of the hearing and a copy of the application for the permit will give you a better idea of the question at issue.

The permit was allowed by the Commission. The Atlantic moved for rehearing, and, this having been denied, Atlantic, within due time, filed suit in the District Court of Travis County (this county) to set aside the permit, on the grounds upon which the protest had been made.

The filing of the suit was effective, as a practical matter, to suspend the permit. In Atlantic's pleading it stated that either Atlantic or the State, or both, would shortly file a title suit to settle the question of title to the 21 acres.

In due time the State of Texas filed the title suit in Nueces County, and Atlantic later intervened, making common cause with the State.

Since the right to the permit to drill well No. 5 depends upon ownership of the 21 acres, the status of the case in Travis County (without formal agreement) will of necessity remain inactive pending final outcome of the title suit. If the Burnett title is sustained the permit suit will be dismissed or will result in judgment for defendant and the permit will issue. If the State recovers the title, the permit will be cancelled. The final judgment in the title action will, in effect, dispose of the matter.

The State and the Atlantic also contend that Blucher (the Burnett surveyor) has erroneously included about five acres near the west end of the island that are actually in the water. This contention to the extent, if any, that it may prevail would reduce the daily oil allowable allocated to the well, but would not be sufficient to prevent the drilling of the well.

To the title action, as I see it, there are two defenses. First, that the submergence was the result of an avulsive, not a gradual, change. Second, that since the triangular area involved is within the boundaries explicitly called for the patent, and the lines are capable of ascertainment, and the points called for are capable of being located, the so-called doctrine of submergence is not effective to devest Mr. Burnett of title and re-vest it in the State.

If either defense should be sustained, defendant would prevail in the suit.

As to the fact issue, we had hoped to prove that the storm and tidal wave of 1919 caused the submergence. Circumstantial evidence will tend to support this contention. Whether the fact can be proved more directly, or conclusively, we are not able to say.

The U. S. Coast & Geodetic Survey, in a monograph entitled Tidal Datum Planes, states that in recent years the sea level along the Gulf Coast has been gradually rising. No data appear as to planes in the Corpus Christi area, but results are reported of observations at Galveston, at Key West, and at Pensacola. It is reported: "For Galveston the observations extend over a period of 40 years, and during all of this time the sea level appears to have been rising. Between 1909 and 1940 the rise was at the rate of about 0.015 foot per year, and since that time at the rate of about 0.05 foot per year." This, as you can see,

means a rise of nearly one foot (.95 foot) from 1909 to 1950, and might account for the submergence—so-called—of the 21 acres.

While Mr. Burnett at one time suggested that he thought the legal defense is complete, without need of the fact defense, I assume that he will expect his attorneys to present any defense that they think is substantial, not frivolous.

Since the fact issues may be determined by a jury, and for other reasons, it seems to me that, although Austin counsel are not indispensable, Corpus Christi counsel are well nigh indispensable.

This brings me to the part of your letter relating to the attorney fees.

Frankly, I do not regard the case as falling within the type or class to which a per diem schedule is applicable. Texas lawyers with whom I have talked concur in this view. It seems to be the consensus of Texas lawyers that the figures named in your letter do not allow adequately for overhead expenses. A fee arrived at on the basis of $100 per day for the actual trial of such a case—a trial that would hardly last more than a very few days—would be regarded generally as not within the range of reasonable compensation.

Upon inquiry I find that the schedule named in your letter for the chief counsel and for associates is substantially lower than the schedule prevailing at Corpus Christi, and at other Texas cities, even for the ordinary run of damage suits and other cases in which the per diem is usually employed.

For my part, because of my personal regard for Mr. Burnett and of my gratitude for his many kindnesses, I should be inclined to continue in the pending case on a fee arrangement that we think is too low.

However, as I understand your letter, you have specified that Mr. Weil be compensated for work done out of court at the rate of $6.50 per hour. I cannot ask him to accept those terms.

I have the impression that because of our widely divergent views over attorney's fees, Mr. Burnett has concluded that his interests will be better served in the hands of new counsel. I realize that even if we should accommodate our differences as to the pending case, nevertheless so long as the fee in the Mar-Tex case remains unresolved, he would be better satisfied with other counsel.

We stand ready of course to send to you, or as you may direct, memoranda reflecting our studies, names of prospective witnesses, and all relevant papers, maps, et cetera. Please understand that excepting the surveyor, Mr. Blucher, the witnesses have not been interviewed, and even he has not been questioned on the subject of the 1919 storm.

It is hardly necessary to say that I have not attempted to form an opinion—much less to express one—about the fees for the extended period of litigation in which you have been engaged. I know nothing about the nature of the case, or the expense allowances that might have compensated in part for overhead, or might even have relieved the attorneys of the usual overhead expenses. Besides, there may well be other factors applicable to that case and to that particular relationship that differentiate it from this Texas situation.

Very truly yours,
IRELAND GRAVES

IG:ej
Enclosures

g. Exhibit 49

COPY

JOSEPH T. ENRIGHT
Attorney at Law
541 South Spring Street
Los Angeles 13
MIchigan 3827
March 31, 1953

Judge Ireland Graves
Box 1123
Austin 66, Texas

Dear Judge Graves:

Referring to your letter of March 27th. I thank you for your statement of the issues of the two Shamrock title actions and of your belief upon attorneys' fees therein.

It is a policy of Monolith and associated interests to take full responsibility for fixing the theory of and the entire responsibility for the outcome of litigation and consequently it is not willing to pay contingent fees based upon their outcome. In litigation the main legal expense encountered is the studies of the controversies before trial. I feel certain that no changes will voluntarily be made from this policy as it is based upon a plan of not permitting cases to go to trial if the management believes, after a thorough briefing of the pertinent law and facts by its attorneys and other experts, that a serious question of law or fact exists.

Time rates contained in my letter of March 13, 1953 would carry the same fees for you or any member of your firm or the Kleberg firm, including Mr. Weil and the $6.50 rate applies only to juniors and assistants. I make bold to say that I think you would be agreeably surprised at the satisfactory amounts which are accumulated as fees in offices which carefully time their individuals' efforts and

regularly bill and collect therefor. I may add that the enormity of the verdicts in damage cases has made them one of the most expensive types of litigation.

If your firm and/or the Kleberg firm would care to proceed with these two cases upon a time basis at rates approximately those I tendered I would be glad to submit this for consideration as I prefer no changes of attorneys be made, especially under the circumstances appearing so far as my preliminary intrusion has permitted my observing them.

Very truly yours,
Joseph T. Enright

JTE:s

h. Exhibit 50

COPY

(LETTERHEAD OF GRAVES, DOUGHERTY & GREENHILL)

April 6, 1953

Mr. Joseph T. Enright
541 South Spring Street
Los Angeles 13, California

Dear Mr. Enright:

Thank you for your letter of March 31st, correcting my misinterpretation of your letter of March 13th.

We should prefer, for a number of reasons, to continue in the cases.

If your recommendation should be approved, we shall proceed, with Mr. Weil's firm, on the terms outlined in your letter of March 31st.

Awaiting your further instructions, I remain,

Sincerely yours,
(Sgd.) IRELAND GRAVES

IG:ldp

2. Defendants' Exhibit No. 4

COPY

JOSEPH T. ENRIGHT
Attorney at Law
541 South Spring Street
Los Angeles 13
MIchigan 3827

April 8, 1953

Judge Ireland Graves
Graves, Dougherty & Greenhill
Box 1123
Austin 66, Texas

Dear Judge Graves:

Thank you for yours of April 6, 1953, expressing your preference to continue in the Burnett Mel Dar cases.

I have submitted the recommendation proposed in my March 31, 1953 letter to you, to Mel Dar, and the recommendation has been approved; the basis of compensation being $100.00 per full court day, appearances requiring one-half day or less at the rate of one-half of the court full day; office services for chief counsel (including any member of the firm, thus eliminating my misunderstanding concerning Mr. Weil), $10.00 per hour, and for assistants at the rate of $6.50 per hour.

Would you, therefore, proceed as you deem best with the Kleberg or Weil firm. There is still a little confusion in my mind as to whether Mr. Weil is a member of that firm or another firm, which I can check out when and if I ever work out of my present efforts to, in a short brief, cover three and one-half months of court record made in the recent RFC trial.

Time has not permitted me to attempt to further comprehend the aspects of the pending cases involving the title to the 22 acres, except the following: All the law should be thoroughly briefed upon the writings evidencing the monuments describing the 22 acres in the grant, thus avoiding any disputable fact, leaving only the making certain of the law applicable. Upon the law being confirmed by research, Atlantic's defensive contentions concerning evulsion, reliction, or accretion, can then be factually and legally explored.

My opening brief in the RFC matter is due May 5th, at which time I hope to be of assistance to our principals in finally determining the theory of these cases.

Very truly yours,
Joseph T. Enright

JTE:MH

P.S. I assume the above basis of compensation is acceptable on such other matters as may arise requiring attention.

JTE

FILED
MAY 25 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 945

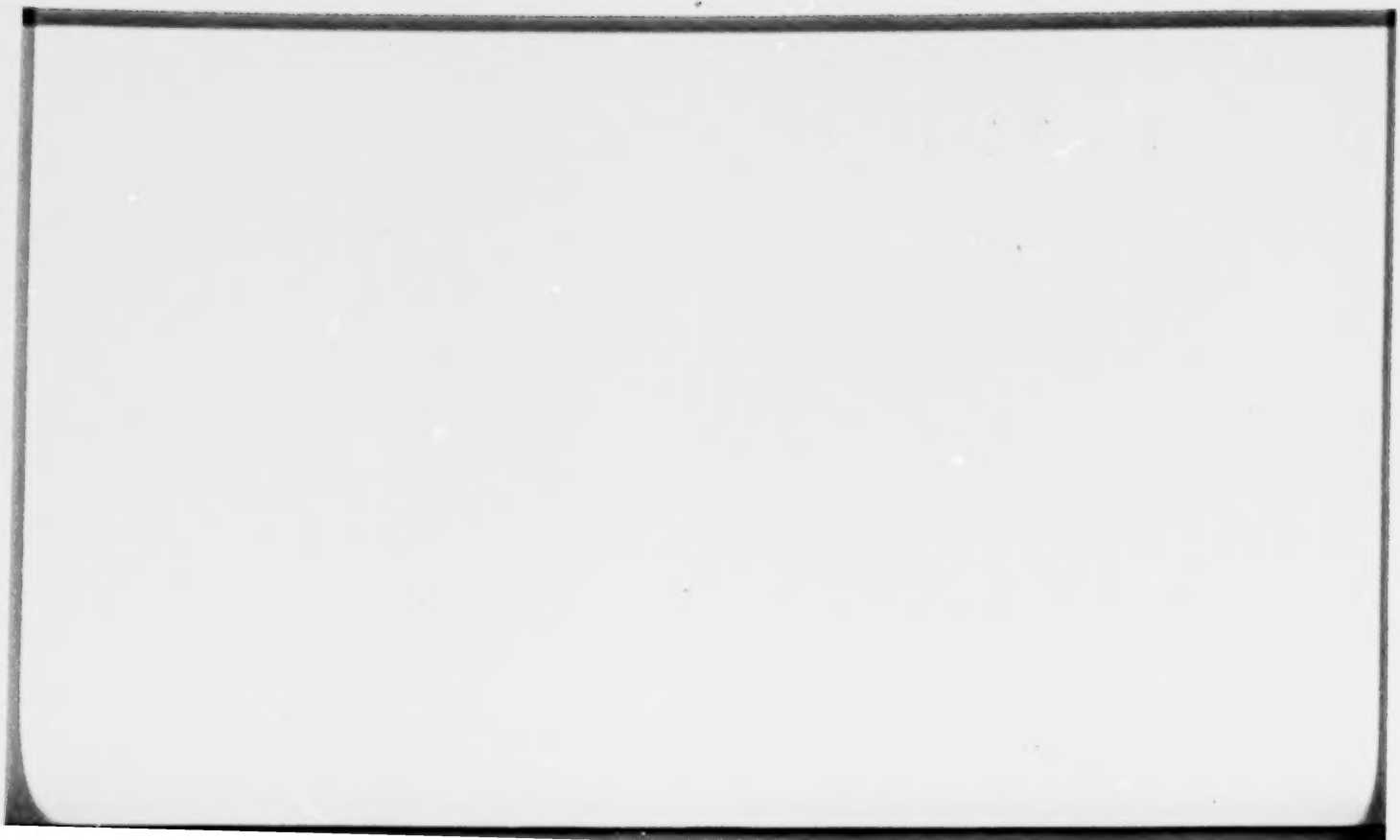
COY BURNETT and MEL DAR CORPORATION,
Petitioners

v.

IRELAND GRAVES, J. CHRYS DOUGHERTY and JOE R. GREENHILL,
Individually and as members of the partnership of GRAVES, DOUGHERTY & GREENHILL, ET AL.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES L. BLACK
JOHN W. STAYTON
P. O. Box 1073
Austin 66, Texas
Attorneys for Respondents



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CITATIONS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 945

COY BURNETT and MEL DAR CORPORATION,
Petitioners

v.

IRELAND GRAVES, J. CHRYS DOUGHERTY and JOE R. GREENHILL,
Individually and as members of the partnership of GRAVES, DOUGHERTY & GREENHILL, ET AL.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SCOPE OF THIS BRIEF

Petitioners have tendered for filing along with their Petition for Writ of Certiorari an appendix containing thirty-five pages of comments on the evidence and citation of authorities. While, in view of paragraph 3 of *Rule 23*, this Brief in Opposition makes no explicit reference to it, the argumentative

matter in the appendix is in substance answered herein.

QUESTIONS PRESENTED

In this suit for reasonable attorneys' fees for services expressly contracted for and admittedly performed, the only substantive question at issue was the amount to be allowed respondents. The petition is wholly concerned with alleged procedural errors,[1] and raises the following questions:

1. The trial court having submitted to the jury the question of the amount to be allowed respondents as fees for their services; and the courts below having held that there was no evidence raising an issue of estoppel, and the petition being devoid of any statement from the record refuting such holding,

(a) Was it reversible error to refuse to submit separately the issue of whether respondents were estopped to deny they were working on a time basis and to claim more than $15,000.00?

(b) If so, was the failure to submit such issue such a departure from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision?

2. Respondent Graves having been employed by petitioners as chief counsel, the others to work under

[1]Three of the four questions pertain to charges given or refused, and raise again the question whether this Court sits to review procedural minutiae. To sustain the fourth would require this Court to substitute petitioners' construction of a Texas procedural statute for the interpretation placed upon it by the courts below.

his direction, and the services having been performed by the team pursuant to that arrangement,

(a) Was it reversible error to refuse to require the jury "to separately evaluate the services of each respondent attorney"?

(b) If so, was the submission of a single issue requiring the jury to determine the reasonable value of the services of respondents, in lieu of the submission of several issues requiring the jury to separately fix the value of the services of each of three firms of attorneys "upon a time basis," such a departure from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision?

3. Where the evidence showed that the property interest saved in the *Mar-Tex* case for petitioners by respondents' efforts had a cash market value of $2,000,000.00, and petitioner Burnett sought to show that state and federal income taxes would materially reduce the net amount of income he would realize from the property interest if he chose to *retain* it rather than to sell it,

(a) Was it reversible error to instruct the jury that in determining the benefit derived by petitioners from respondents' services, the jury should not consider income taxes that petitioners might be required to pay on revenues derived from the property if they chose to retain it rather than to sell it?; and, if so,

(b) Was the court below correct in holding that since petitioners did not object to the charge, but at-

tempted for the first time to raise the question in the Court of Appeals, the complaint came too late, and the objection was waived?

4. As to petitioner Burnett, did the courts below err in holding that under Article 7.01, *Texas Insurance Code*, providing that where a surety bond is "required to be filed in any judiciary proceedings" a bond executed by *one* corporate surety and by no other surety is acceptable, "and any statute or law to the contrary, or requiring any such bond to be signed by two or more good and sufficient sureties, shall be governed * * * by the provisions of this article," respondents' attachment bond was sufficient, although signed by only one corporate surety and by no other surety, such corporate surety being acceptable on any Federal surety bond not exceeding $6,302,000.00 in penal sum.

STATEMENT OF THE CASE

The intemperate petition;[2] the misstatements therein; the substitution of erroneous argument and conclusions for the "concise statement of * * * the facts" required by *Rule 23(e)* necessitate a statement of the case by respondents.

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[2]Examples: "gross and flagrant miscarriage of justice;" "a classic example of local and sectional prejudice in action;" "the question before this Court is whether a non-Texan becomes a second class citizen when he does business in Texas." (Petition, pp. 4, 6, 17.) It is worthy of comment that petitioners were satisfied with the justice meted out to them by Texas courts in the Mar Tex case in which they, a citizen of California and a foreign corporation, were given judgment for a property interest worth $2,000,000.00.

Petitioner Burnett, having lost the first phase of his suit with Mar-Tex, involving its claim that it had an oil and gas lease on Shamrock Island, fell out with his Texas counsel. Burnett then employed as such counsel respondent Graves and his firm. On Graves' recommendation Burnett employed the Kleberg firm as associate counsel (R. 271-272) and later with Burnett's approval Graves employed Kendall to assist him (R. 276, 69).

The second phase of the case, involving the right of Burnett and petitioner Mel Dar (Burnett's family corporation) to reimbursement for expenditures in drilling oil wells on Shamrock Island pending the litigation, was tried and won by Burnett and Mel Dar with respondents as their counsel. (R. 273-5.)

Burnett and Mel Dar appealed from the adverse judgment on the first phase of the case and the Court of Civil Appeals rendered judgment for Burnett and Mel Dar. (R. 348.) Mar-Tex then appealed to the Texas Supreme Court but that court refused to review the action below. (R. 349-50, 355.)

Admittedly the property interest at stake in the *Mar-Tex* case will produce *net* revenue of $4,700,000.00. (R. 250, 681.) Respondents' expert testified that the *market* value of this interest was $2,000,000.00,[1] and while petitioners' witness fixed a lower value, neither he nor Burnett disputed respondents' evidence that the property interest could have been sold in the open market for $2,000,000.00. (R. 249-51, 526-642, 681-3.)

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[1]Values were given as of the time the Mar-Tex suit ended. (R. 254-5.)

Respondents conservatively estimated the total time devoted by them to the appeal at 270 days. (R. 359, 362, 440, 465, 498.)

There was no agreement as to respondents' fee. (R. 282-3.) After their trial court work, petitioners paid the Graves and Kleberg firms a fee of $15,000.00 for it. (R. 276-7.) In so doing Burnett wrote Graves the following:

"If, as I think is possible, the presentation of the letters and the law and the record showing a failure of plaintiff to comply with the condition preceding were carried to a point that both the trial court *and plaintiff's attorneys were convinced*, and no appeal were taken by plaintiff, I should be willing to consider a further fee in substantially the amount [$15,000.00] you and the Kleberg firm have tendered." (R. 69.)

Petitioners' statement (petition, p. 4) that Burnett "advised the attorneys that the same fee as was paid for trial court services—$15,000.00—represented his opinion as to a reasonable fee for post-trial services," such statement being allegedly supported by the above quotation from the letter, is erroneous. Burnett made no such claim in his testimony and the assertion in the petition is counsel's misconstruction of the quoted letter. (See p. 18, *post.*)

As the Court of Appeals said:

"* * * Burnett's letter, pressed so heavily on us, written within a month of the engagement, discussing a $15,000.00 fee related to the good faith improvement claim just completed and expressed the

idea that a *like* fee would be payable on the 'contract-no contract' suit *if* no appeal were needed. This was no representation as to what would be due if an appeal were necessary, nor did it put on the attorneys the duty of indicating that or any other sum." (Appendix to petition, hereafter called "appendix," p. 14; 230 Fed. (2d) 56.)

After winning the case respondents did not, as petitioners assert (petition, p. 4), *demand* $100,000 for their services on appeal. Instead, Graves wrote Burnett "to suggest" a fee of "from $75,000.00 to $100,000.00." Graves stated that "we have no formula that will enable us to say with assurance that the fee should be a given amount, no more and no less," and also wrote "that if you think that these suggestions are out of line, we should be glad to discuss the matter with you." (R. 71.)

Burnett replied that it would be necessary "to present grounds which are sound and persuasive if substantially more than $15,000.00 is to be paid" as a fee on appeal. (R. 74.) After seven months' correspondence about the fee Graves suggested a fee of $55,000.00 by way of compromise. (R. 88-9.) After more fruitless correspondence Burnett advised Graves that no more than $15,000.00 would be paid respondents unless they got judgment for it. (R. 100.)

Seventeen months after the *Mar-Tex* case was finally concluded this suit was filed in a state court against Mel Dar, a foreign corporation doing business in Texas, and Burnett. A writ of attachment was levied on Burnett's interest in Shamrock Island and he was served with a nonresident notice (by

delivery of copy of citation and complaint), all in the manner provided by Texas practice for securing jurisdiction over Texas property of a nonresident. (R. 1, 2, 4, 5, 7-16, 54.)

Petitioners' statement (petition, p. 11) that the "judgment as worded was *in personam*" is incorrect. As to petitioner Burnett, the final judgment found him, "jointly and severally with defendant Mel Dar Corporation, * * * justly indebted to the plaintiffs in the sum of Eighty Thousand Dollars." It ordered that the "attachment lien" on Burnett's interest in Shamrock Island "be, and the same is, hereby foreclosed * * * and that an order of sale shall issue to the sheriff or any constable of Nueces County, Texas, directing him to seize and sell the same as under execution to satisfy the above described indebtedness of defendant Coy Burnett." (R. 168-70; Appendix, pp. 2-3.) Plainly this is a judgment *in rem* and not *in personam*.

Petitioners removed the suit to the Federal Court where Mel Dar demanded a jury trial. (R. 37.) As soon as the jury panel was available the trial judge, as is usual in Texas, required the parties to select a jury. This jury sat when actual trial of the case began two weeks later. To this procedure there was no objection. (R. 197.)

The trial judge (Judge Rice) did not, as asserted by petitioners (petition, p. 5), allow respondents' counsel to call Burnett a "California welcher." This epithet is not in the record. The words "welch" and "welching" do appear because in the Mar-Tex appeal respondents, as counsel for Burnett and Mel Dar, were confronted with the contention that Bur-

nett was attempting to welch on a bargain he had made with Mar-Tex. In the instant case counsel for respondents elicited from the witnesses testimony that the reversal of the Mar-Tex judgment was rendered more difficult by this argument. (R. 330-2, 455, 483.) There would have been no mention of "welching" had not petitioners' main defense on the merits been that the *Mar-Tex* case was a "simple case" requiring little legal skill. (R. 209.)

In the trial of this case respondents presented the testimony of eminent Texas lawyers about the difficult nature of the appeal of the *Mar-Tex* case and the reasonable value of respondents' services in conducting that appeal. The lawyers so testifying were James W. McClendon, member of the Texas Commission of Appeals from 1918 to 1923 and Chief Justice of the Austin Court of Civil Appeals from 1923 until his retirement on January 1, 1949 (R. 443-8); James P. Hart, a practicing lawyer of wide experience, a justice of the Supreme Court of Texas from 1947 until he resigned in 1950 to become Chancellor of the University of Texas (R. 477-85); A. W. Walker, Jr., a practicing lawyer, a professor of law at the University of Texas from 1925 to 1948, where he taught oil and gas and other real property law, author of numerous articles on oil and gas law, who represented Mar-Tex throughout the trial and appeal of the *Mar-Tex* case (R. 383-404); David T. Searls, a practicing lawyer since 1929, a member of the Houston law firm of Vinson, Elkins, Weems & Searls (R. 304-12); Dan Moody, a Texas lawyer since 1914, one time Attorney General of Texas, a former Governor of Texas (R. 466-77); Everett L.

Looney, a practicing lawyer in Texas for thirty-three years, a past president of the State Bar of Texas (R. 514-24); Gillis A. Johnson, a practicing lawyer in Texas since 1921 (R. 290-304); and Ralph W. Yarborough, a Texas lawyer since 1927 (R. 485-95). Petitioners evidently refer to these lawyers when they state (petition, p. 5) that the trial judge "permitted procedures which allowed the attorneys to unduly influence and affect the jury with the cumulative testimony of nine politically prominent local judges and attorneys."

ARGUMENT

(1) The courts below correctly held that the attachment bond complies with the requirements of Texas law.

The courts below applied the right statutes correctly construed. Though Article 279, *Texas Rev. Civ. Stats. 1925*,[4] requires that a writ of attachment be executed by "two or more good and sufficient sureties," Article 7.01 of the *Texas Insurance Code*[5] provides that "any bond * * * required to be filed in any judiciary proceedings" may be accepted although signed by *one* corporate surety and by no other surety and "any statute or law to the contrary, or requiring any such bond to be signed by two or more good and sufficient sureties, shall be governed and controlled by the provisions of this article." More-

[4]Appendix, p. 18.
[5]Appendix, pp. 20-1.

over, Article 7.02 of the same code* provides that whenever "any bond * * * is, by law * * * required or permitted to be * * * filed * * * such bond * * * may be executed by a surety company * * * and such execution by such company * * * shall be in all respects a full and complete compliance with every law * * * that such bond * * * be executed by * * * one or *more* sureties, * * * and all courts * * * and public officers of every character shall accept and treat such bond * * * as conforming to, and fully and completely complying with, every requirement of every such law," *etc.*

There is not, as petitioners argue, any question of "an *implied* repeal of the special Texas attachment statute by the general surety bond statute." (Petition, p. 8.) The Legislature has *expressly* provided that Articles 7.01 and 7.02 control in the instance of a bond executed by a corporate surety and by no other surety.

Little argument is necessary; the matter has been decided by the Texas courts. In *McCaskey Register Co. v. Gooch* (Tex. Civ. App.), 31 S. W. (2d) 324, the court had to determine the validity of an appeal bond filed in a case taken from the justice to the county court. The applicable statute, Article 2456, *Texas Rev. Civ. Stats. 1925*, provided that "such bond must be executed by two or more good and sufficient sureties," the language of Article 279. In the county court the defendant below moved to dismiss the appeal because the "appeal bond was executed by only *one* surety" (31 S. W. 2d 324), that

*Appendix, pp. 22-3.

is, "by the plaintiff as principal and the National Surety Company as surety" (31 S. W. 2d 325). In holding that the county court had erred in dismissing the appeal upon this ground, the court cited Article 4970 (now Article 7.02 of the *Texas Insurance Code)* and *International-G. N. R. Co. v. Smith* (Tex. Civ. App.), 269 S. W. 886.

In *International—G. N. R. Co. v. Smith,* the court said:

"Under the provisions of Article 2097, Revised Statutes, a cost bond on appeal must have 'two or more good and sufficient sureties,' and the only exception to that requirement *is where a surety company makes the bond.*" (269 S. W. 890.)

Petitioners try to avoid the plain language of Articles 7.01 and 7.02 upon the authority of *Jefferson County v. Board of County and District Road Indebtedness,* 143 Tex. 99, 182 S. W. (2d) 908. That case involved a "special" act such as is prohibited in most instances by the Texas Constitution. The act authorized the Highway Commission to build a bridge across the Neches River and was a "special" law that would have been unconstitutional had it not been within the purview of other constitutional provisions excepting certain kinds of special laws from the general prohibition. (See *County of Henderson v. Allred,* 120 Tex. 483, 40 S. W. 2d 17.) The court held that this special act was not repealed in part by a later general law that recited that this "Act shall be cumulative of all other valid laws on the subject, but in the event of a conflict between any provision of this Act and

any other Act, the provisions of this Act shall prevail." (123 Tex. 110, 182 S. W. 2d 915.) The court held: "The intention to repeal special Acts embodying conflicting provisions must be *clearly evidenced.*" (143 Tex. 111, 182 S. W. 2d 915.)

The court thought the proviso that the act should prevail if in conflict with "any other Act" had reference to "any other *general* Act" and not to "any other general or *special* Act."

No "special" act (a better designation here is act of "specific" application; see *Baltimore Natl. Bank v. Tax Commission*, 297 U. S. 209, 215, petition, p. 8) is here involved. Articles 279, 7.01 and 7.02 are not such acts. Each of these statutes is a general law albeit each has a limited field of operation. Article 279 applies to only one kind of bond, attachment bonds. Articles 7.01 and 7.02 apply to only one type of bond, bonds executed by corporate sureties. Each of these statutes being a general law, the question is whether the Legislature has evidenced its intent that Articles 7.01 and 7.02 shall control in the instance of a bond executed by a corporate surety and by no other surety. Plainly such intent is shown.

Even if Article 279 were a "special" act within the meaning of the Texas Constitution, Articles 7.01 and 7.02 would control in cases involving bonds executed by corporate sureties because such intent is "clearly evidenced" (using the language of the case relied upon by petitioners) by the above quoted provisions of these statutes.

Nor is there merit in the argument that Article 7.01 *requires* that a bond exceeding the penal sum of $50,000.00 be executed by more than one qualified

surety. The language that when such a bond is tendered "the officer * * * *may* require that such bond be signed by two or more surety companies, or by one surety company and two or more good and sufficient personal sureties" plainly means that discretion is *first* given to the officer in an instance where such a bond is tendered. If the officer exercises his discretion by refusing to accept such a bond executed by one corporate surety and by no other surety, the party tendering the bond may then *elect* whether to file one executed by two corporate sureties or one executed by one corporate surety and two good and sufficient personal sureties.

Petitioners' argument that the word "may" means "must" is in the teeth of Texas decisions that "may" is usually considered to be permissive and not mandatory. *San Angelo Natl. Bank v. Fitzpatrick*, 88 Tex. 213, 30 S. W. 1053; *American Mortgage Corp. v. Samuell*, 130 Tex. 107, 108 S. W. (2d) 193.

In the case first cited the court said:

"We are aware that the word 'may' is sometimes construed as if it were 'shall'; but it is not to be denied, that in its primary and ordinary signification it is a word of *permission*, and not a word of command. Before treating it as a word of command, there should be something either in the subject matter or the context to indicate an intention that it was employed in that sense." (88 Tex. 216, 30 S. W. 1054.)

The Texas case cited by petitioners in support of their interpretation of the word "may" is *Commonwealth of Massachusetts v. United North & South*

Development Co., 140 Tex. 417, 168 S. W. (2d) 226. This is a poor selection since the case, as shown by the following quotation, supports respondents' interpretation of Articles 7.01 and 7.02:

"* * * Arts. 4969, 4970 [now Articles 7.01 and 7.02] neither add to nor take anything from the requirement of Art. 4077 that the sureties shall each be bound with the principal to pay 'in double the amount of the debt claimed.' They merely provide for the creation of corporate surety companies; that one corporate surety may execute a bond required by statute; that *when any bond exceeds $50,000*, two or more corporate sureties *may* be required to sign it; and that when so executed the bond shall be regarded and accepted as being in compliance with any statute requiring a bond in judicial proceedings." (140 Tex. 421, 168 S. W. 2d 228-9.)

Respondents' interpretation of Articles 7.01 and 7.02 conforms to that of Texas officials charged by law with the duty of receiving and filing bonds. It is the practice of the Texas Highway Department to accept a bond executed by one surety company and by no other surety even though the penal sum of the bond exceeds $50,000.00. (R. 714-17.) This is the practice of the clerk of the district courts of Travis County, Texas, in receiving and filing supersedeas, *attachment*, appeal and other bonds. (R. 718-21.) The same is true of the office of the county clerk of Travis County, Texas. (R. 725-7.)

Since this departmental interpretation is entirely reasonable, it should be adopted by the courts, assuming contrary to actual fact that the language of the statutes is ambiguous. *Tolleson v. Rogan*, 96 Tex.

424, 432, 73 S. W. 520, 524; *Koy v. Schneider*, 110 Tex. 369, 221 S. W. 880; *Slaughter v. Yoakum County*, 109 Tex. 42, 195 S. W. 1129.

Moreover, the judicial interpretation placed upon Articles 7.01 and 7.02 in the *McCaskey* and *International— G. N. R. Co.* cases, *supra*, and the construction placed upon them by the departments above named has been approved by the Legislature. In 1951 the Legislature enacted the Insurance Code and Articles 7.01 and 7.02 of this Code are reenactments of Articles 4969 and 4970, with their language unchanged. 14 *Vernon's Tex. Civ. Stats.*, pp. 256, 258. Thus the Legislature has conclusively evidenced its approval of the judicial and departmental construction theretofore placed upon such statutes. *Stephens County v. Hefner*, 118 Tex. 397, 16 S. W. (2d) 804; *Cargill v. Kountze*, 86 Tex. 386, 25 S. W. 13; *Tom Green County v. Motley*, 132 Tex. 54, 118 S. W. (2d) 306; *Magnolia Petroleum Company v. Long*, 126 Tex. 195, 86 S. W. (2d) 450; *Federal Crude Oil Co. v. Yount-Lee Oil Co.*, 122 Tex. 21, 52 S. W. (2d) 56.

This Court has stated on various occasions that, since the district courts and Courts of Appeals are more familiar with the local laws of the states within their jurisdictions, it is requisite that one challenging a judgment based upon local law show that their conclusions about it are clearly wrong or unreasonable. *Propper v. Clark*, 337 U. S. 472, 486-487; *MacGregor v. State Mutual Co.*, 315 U. S. 280. While we think it abundantly clear that the courts below have correctly interpreted the Texas law, there can be no question that petitioners have failed to show

that the conclusions of such courts are so patently wrong or unreasonable as to justify the intercession of this Court.

(2) The trial court did not err in refusing to charge the jury on estoppel.

Petitioners again violate *Rule 23(e)* by not stating in essence the requested issue and the evidence allegedly supporting the plea. They say their plea of estoppel is "supported by substantial evidence" (petition, p. 5) and refer to nine exhibits and seventeen pages of the record that are irrelevant. Again respondents will assume petitioners' burden of stating the facts.

Petitioners requested an issue as to whether "plaintiffs [respondents] are estopped to deny that they were working as attorneys for the defendants [petitioners] *on a time basis* and to claim more than $15,000.00 as attorneys' fees on appeal?" The tendered instructions were that respondents would be estopped if they had led petitioners to believe "they [respondents] would keep *time* and work on a *time basis*" and had then without notice changed their basis so as to charge petitioners "a large fee up to $100,000.00." (R. 135.)

There is nothing in the argument about the tendered estoppel issue because it embodied the premise that respondents agreed to work for petitioners on a time basis and because it is undisputed that no such agreement was made. Graves testified that Burnett "suggested" the keeping of "some kind of a record of the time spent on the case" but that he

"stated explicitly to me that he would not ask his lawyers to work on a *per diem* basis" and that "he would not ask us to take the case on that basis." (R. 283.) Burnett testified at length but did not dispute Graves' testimony (R. 526-99); he agreed with it except in one particular of no moment here. (R. 528, 532.)

Moreover, there is no evidence that respondents did anything that could have misled petitioners. Petitioners do assert in their Statement (petition, p. 5) that Burnett advised respondents $15,000.00 "represented his opinion as to a reasonable fee for post-trial services" and that respondents replied that such proposal was "reasonable and fair;" but, as shown at pp. 6-7, *ante*, these statements are allegedly based upon a letter that in no way supports them.

Likewise, it is undisputed that petitioners were not in fact misled by respondents. The undisputed evidence offered on behalf of petitioners is that Burnett and his bankers without informing respondents decided that $15,000.00 should be budgeted for attorneys' fees on appeal. (R. 73-4, 407, 418.) There is not a scintilla of evidence that in doing so Burnett or his bankers relied upon anything respondents did or failed to do. While on the stand Burnett neither stated nor intimated that respondents misled him by what they did or did not do. (R. 526-99.)

In the foregoing connection we refer to Burnett's reply to Graves' letter suggesting a fee of from $75,000.00 to $100,000.00. In his reply Burnett stated that $15,000.00 had been budgeted for attorneys' fees on appeal and he listed the "important factors

considered by our bankers and ourselves" in so doing. No mention is made of anything respondents did or failed to do that led petitioners to believe $15,000.00 would constitute a reasonable fee for services on appeal. (R. 73-4.) In fact, in correspondence about the fee over a period of seventeen months petitioners never claimed respondents had misled petitioners about what respondents would charge as their fee. (R. 73-6, 83-4, 86-7, 91, 97-101, 107, 109-10, 114-17.)

The courts below correctly held, therefore, that the evidence raised no issue of estoppel and that there was no reason to submit such issue to the jury.

Moreover, the issue submitted to the jury inquired as to the amount to be allowed respondents as a reasonable fee for their services under the evidence adduced, taking into specific account the several factors, including the factor of time spent on the appeal, mentioned by the trial court in his instructions. (R. 159-62.) The items of evidence that petitioners say raised the issue of estoppel were not excluded from consideration of the jury; and the Court of Appeals therefore correctly held that, under the issue submitted: "So far as these bore generally on the value of services rendered, the jury was the judge. None presented a matter for special instruction, much less peremptory direction." (Appendix, p. 14; 230 Fed. (2d) 56).

Since the trial court submitted to the jury an issue that in his judgment embraced the whole of the matters in dispute, his refusal to submit the inquiry in the splintered form requested by petitioners, even if erroneous, does not constitute such a departure from the usual and accepted course of judicial proceedings

as to call for exercise of this Court's power of supervision. If alleged errors of this kind are to be reviewed by this Court, it could be called upon to review the form and content of every charge in every civil suit in the Federal district courts. Such is not a proper burden of this Court. *Rule 19-1(b).*

(3) The trial court did not err in submitting one issue inquiring as to what would be a reasonable fee for the services rendered on appeal by all respondent lawyers.

Petitioners say it "is undisputed that the employment was separate and not joint" and refer to page 12 of the record (petition, p. 14) where respondents plead that Burnett employed "the law firm of Kleberg, Mobley, Lockett & Weil as *associate* counsel." On the following page of the record respondents allege that Graves with the consent of petitioners "engaged plaintiff [respondent] Kendall to *assist* in representing [petitioners] in the appellate courts." These allegations not only reflect a joint rather than a separate employment; the undisputed evidence shows the same.

Graves was employed as leading counsel and the Corpus Christi firm and Kendall were employed to *assist* Graves. (R. 269-73, 276.) As Burnett informed Graves in connection with the employment of other counsel, "if * * * Graves came in the case, it would be his responsibility to select the counsel and divide the work as he saw fit." (R. 530-1.)

Petitioners have repeatedly recognized that they owed a joint fee to respondents for their services on appeal. After such services had been concluded

petitioners' attorney wrote Graves that "upon the appeal in the Mar-Tex case, Mel Dar created a reserve of $15,000 for attorney's fees therein" and that he had been authorized "to enclose a check for $15,000 payable to your firm *and* the Kleberg firm in payment of *all* attorneys' fees in connection with that appeal." (R. 100.) The check itself contained the notation "On account of attorneys' fees for and in Mar-Tex v. Mel Dar (Coy Burnett) appeal." (R. 422.) This letter and check show petitioners' understanding that *one* fee was due counsel and that such lump sum payment should be divided by counsel. Moreover, when petitioners' witnesses testified about the amount to be allowed respondents as their fee, they expressed their opinion as to an *over-all* fee for *all* respondents. (R. 373-8, 660-4.)

Even if the employment had been several instead of joint, nothing would be gained by upholding petitioners' basic argument that they have the right to know how much they are to pay each firm of lawyers. They do not seriously assert that the submission of one issue instead of three in any way affected the total amount of the fee as fixed by the jury; only that they have the right to have the sum apportioned by the jury rather than by agreement among respondents. Petitioners show no injury whatsoever; the error, if any, was harmless.

Petitioners do assert that the submission of one issue "masked the fact that Graves was to receive a staggering percentage of the fee, disproportionate to the time and responsibility involved." (Petition, p. 14.) No record reference is made in support of this statement, which is not surprising since it can-

not be supported. There not only is no evidence that Graves will "receive a staggering percentage of the fee"; there is no evidence as to what percentage he *will* receive. The record plainly shows that Graves and Kendall did most of the work (R. 361) but it does not show how the fee will be divided between them; nor does it show with any certainty what part of the fee will be paid the Kleberg firm.

(4) The trial court did not err in instructing the jury not to consider income taxes.

The error, if any, has been waived. Petitioners did not object to that part of the trial court's charge instructing the jury not to consider income taxes (R. 171-2), with the consequence that under Rule 51, *F. R. C. P.*, the assignment of error has been waived. Moreover, petitioners did not present the point in their motion for new trial (R. 174-89); the point was first presented in the Court of Appeals. For these reasons the Court of Appeals correctly declined to consider the point, stating:

"* * * No objection of any kind was made to the charge when given or even in the motion for new trial. It is raised here for the first time. In the face of such a simple charge (one special issue on the value of appellees' services) and the skillful and lawyer-like way in which counsel for appellants carefully preserved every point, the failure to except seems to have been a calculated intentional tactical decision weighing the advantages and disadvantages of the instruction as it was given. We decline to consider it. FRCP 51. It was certainly not a funda-

mental error which we should notice." (Appendix, p. 12; 230 Fed. (2d) 55, footnote 9.)

Petitioners probably thought that the charge was beneficial to them because calculated to impress the jury with the idea that it should not penalize petitioners by reason of the fact that income derived from oil production enjoys the benefit of the depletion allowance. But whether petitioners so reasoned is immaterial; they made no objection to the instruction and the matter is foreclosed.

Nor was there any error in the instruction. Burnett, over the objection of respondents, injected the matter of income taxes into the case under the guise of testifying as to the value of the property interest involved in the *Mar-Tex* case. (R. 540-1, 562-3.) After Burnett had injected this prejudicial issue, the trial court gave the instruction in question to protect the interest of respondents.

Admittedly income taxes have a bearing upon the market value of real property; a prospective purchaser in a high income tax bracket may not be willing to pay as much for the property as one in a lower bracket. As Burnett himself testified, the market value of any property reflects the consensus of the income tax situation of each and all of the prospective purchasers. (R. 564-5.)

But the market value placed upon the property interest by respondents' expert embraced such income tax elements as are involved in market value. This expert testified with positiveness that the property interest won for petitioners had a *market value* in excess of $2,000,000.00 and that after winning

the case petitioners could have realized $2,000,000.00 by selling the very interest Mar-Tex claimed in its suit against petitioners. (R. 681-3.) Moreover, neither Burnett nor petitioners' witness took issue with this testimony about the market value of the property. Neither witness testified that the property interest involved could not have been sold for $2,000,000.00. (R. 212-31, 526-642.)

What petitioners really contend is that consideration should be given to the peculiar income tax situation of Burnett and his family corporation, Mel Dar. Quite obviously the trial of a case of the kind now before the Court should not be complicated by trying at the same time a tax case, *i. e.*, a case determining the income tax position of one of the parties. If that issue were part of the instant case, it would have taken weeks instead of days to try it.

That the issue of income taxes should not be injected into the trial of a case involving earnings, value, damages, *etc.*, is a rule laid down in *Chicago & N. W. Ry. Co. v. Curl* (C. A. 8), 178 Fed. (2d) 497, 502, and *Stokes v. United States* (C. C. A. 2), 144 Fed. (2d) 82, 87.

Further argument is not justified since the error, if any, has plainly been waived by petitioners.

CONCLUSION

Despite the unwarranted assertions to the contrary in the Petition for Writ of Certiorari, petitioners have had a fair trial in the Federal district court to which this cause was removed by them; and they have had a careful review of their several ar-

guments and complaints by the Court of Appeals for the Fifth Circuit. As has been shown, the only real question at issue between the parties was what amount constituted a reasonable fee for services that petitioners employed respondents to perform, and that respondents successfully performed. Being dissatisfied with the results obtained at the hands of the jury that they themselves demanded, petitioners have imposed upon this Court the burden of reviewing their complaints as to alleged procedural errors.

For the reasons stated in the lucid opinion of the Court of Appeals, and hereinabove, the petition should be denied.

Respectfully submitted,

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Proof of Service

I, Charles L. Black, one of the attorneys for Ireland Graves, J. Chrys Dougherty and Joe R. Greenhill, Individually and as members of the partnership of Graves, Dougherty & Greenhill, et al., respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the.....day of May, 1956, I served a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on Coy Burnett and Mel Dar Corporation, petitioners herein, by mailing a copy

thereof in a duly addressed envelope with air mail postage prepaid to Joseph T. Enright, Esq., petitioners' chief counsel, at his office at 541 South Spring Street, Los Angeles 13, California.

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No. 945

JUN 6 1956

IN THE

SUPREME COURT

OF THE

United States

October Term, 1955

COY BURNETT and MEL DAR CORPORATION,

Petitioners,

vs.

IRELAND GRAVES, J. CHRYS DOUGHERTY and JOE R. GREENHILL, individually and as members of partnership of GRAVES, DOUGHERTY & GREENHILL, ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONERS' REPLY BRIEF

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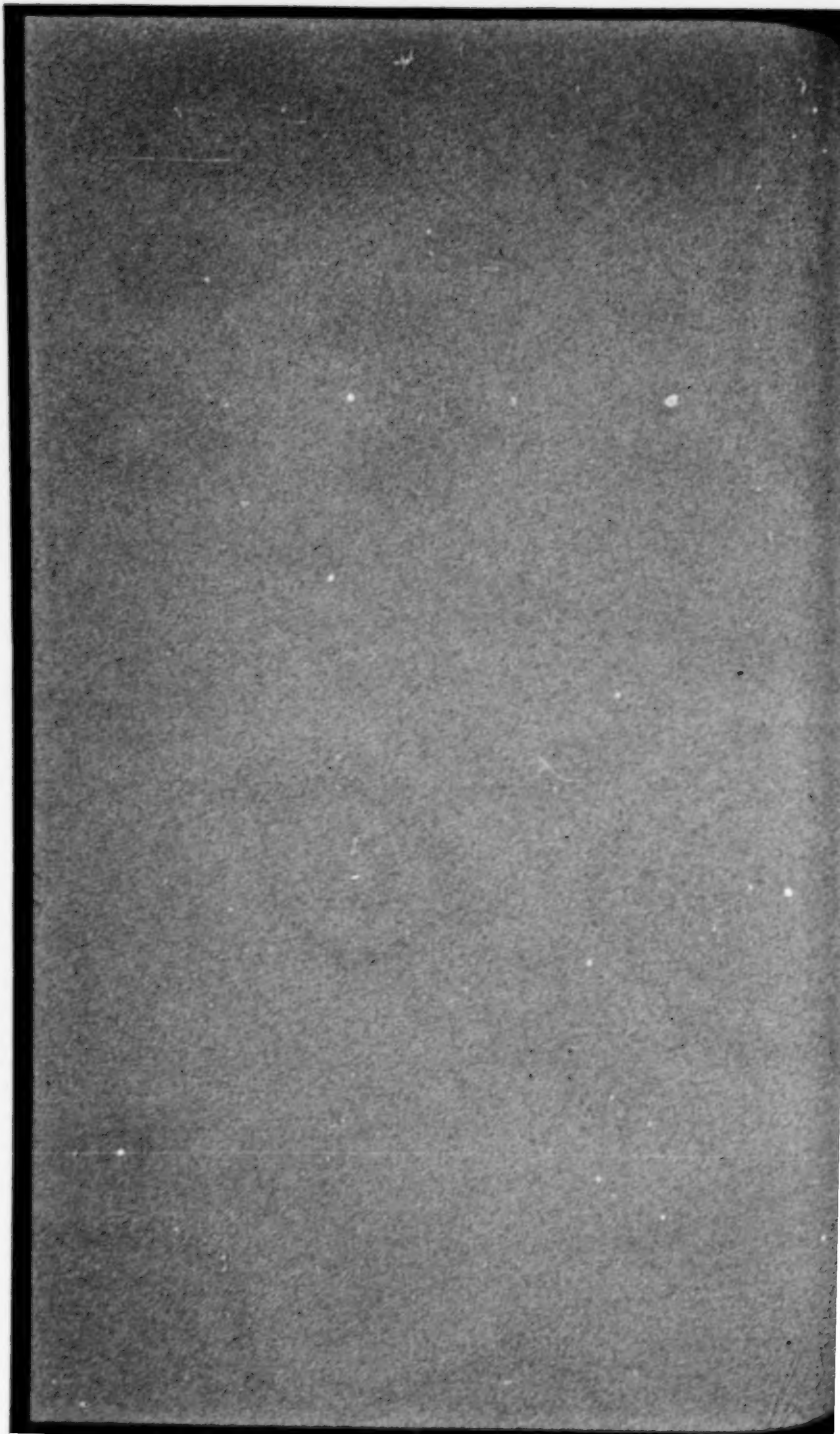

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IN THE

SUPREME COURT

OF THE

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October Term, 1955

COY BURNETT and MEL DAR CORPORATION, *Petitioners,* vs. IRELAND GRAVES, J. CHRYS DOUGHERTY and JOE R. GREENHILL, individually and as members of partnership of GRAVES, DOUGHERTY & GREENHILL, ET AL., *Respondents.*	No. 945

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

Petitioners come now and reply to respondents' Brief in Opposition as follows:

RESPONDENTS' "QUESTIONS PRESENTED"

Respondents' characterization of the questions involved (Brief, pp. 2, 3, 4) as "procedural minutiae" does not answer the propositions:

(a) That the Court below sanctioned the taking of a non-resident's property by approving an attachment: (1) Without compliance with Texas law; (2) Contrary to the decisions of this Court; (3) Contrary to the decisions of the Texas Courts, the District of Columbia Court of Appeals, the Fifth Court's own 1939 decision; and (4) Contrary to the Fifth and Fourteenth Amendments (all as cited in the Petition for Certiorari pp. 6-11);

(b) That the Court below approved the trial court's departure from the accepted and usual course of jury trial proceedings by failing to instruct the jury and submit petitioners' defense of estoppel, contrary to the decisions of Texas courts, its own 1954 decision, the decisions of other Courts of Appeal, and this Court, and in violation of the Seventh Amendment;

(c) That the trial court departed from the accepted and required procedure of submitting separate verdicts for each of the three respondents;

(d) That the courts below failed to set aside a verdict not supported by proof was plain and prejudicial error even though petitioners failed to object to an instruction to disregard income taxes;

(e) That petitioners were not accorded a fair trial.

RESPONDENTS' "STATEMENT OF THE CASE"

Respondents, not petitioners, intemperately assume that the existing confidential relationship of attorney and client imposed no duty on respondents to advise the client that his proposal of a fee of $15,000.00 was not agreeable. Rather, they assert they had the right to tell the client by letter that his offer was "entirely reasonable and fair" (R. 70) and after the services were performed demand a fee of $100,000.00. (Plts.' Ex. 41) After failing to compromise for $55,000.00, they then frequently accused the client before the jury of "welching" and presented an appraisal opinion which disregarded the controlling element of income taxes. Each of their attorney witnesses (most of whom had held a political office) who expressed an opinion as to a reasonable fee, based his opinion primarily upon the appraisal opinion that the clients' recovery (in Texas called gain) was $2,000,000. (R. 295, 302, 308, 309, 475, 476, 483, 491, 520, 521). The appraisal witness arrived at this amount only by disregarding income taxes. (R. 258). The only witness to consider income taxes arrived at a value of $217,000.00. (R. 544).

RESPONDENTS' ARGUMENTS

(1) RESPONDENTS ARGUE THAT "THE COURTS BELOW CORRECTLY HELD THAT THE ATTACHMENT BOND COMPLIES WITH THE REQUIREMENTS OF TEXAS LAW." (Brief, pp. 10-17)

Rarely do Respondents attempt to reply to Petitioners' many authorities establishing the necessity of certiorari. Few, if any, of their cited decisions bear upon the issues such as the following: Respondents state that "little argument is necessary" to establish that the special attachment bond statute was repealed by a general bonding company statute, because "the matter has been decided by the Texas courts". They cite but two Court of Civil Appeals cases (Brief, p. 11). The first, *McCaskey Register Company vs. Gooch* involved a $50.00 appeal bond, (not an attachment bond exceeding $50,000.00 or as here $200,000.00). The second case, *International and G.N.R. Company vs. Smith* also involved an appeal from a judgment for less than $50,000.00—$30,000.00. No executed appeal bond was ever posted. The statement of the court quoted by respondents (Brief, p. 12) was merely dictum and could have no effect upon the attachment bond statute, especially an attachment bond exceeding $50,000.00.

RESPONDENTS CONCEDE

(Brief, pp. 10-11) that they rely upon Article 7.01 and 7.02 of the Texas Insurance Code, authorizing private corporations to act as sureties (Appendix, pp. 20-23). Respondents left out the portion of Art. 7.01 whereby the legislature established the conditions for

a bond exceeding $50,000.00 (Brief, pp. 10-11). To demonstrate the entirely fallacious paraphrasing and interpolating of their own words, we reproduce the article with the conditions to a bond exceeding $50,000.00 underscored and the paraphrased words in italics.

> "Art. 7.01. To Act as Surety. Private corporations may be created to act as trustee, assignee, executor, administrator, guardian and receiver, when designated by any person, corporation or court to do so; to do a general fiduciary and depository business; to act as surety and guarantor of the fidelity of employees, trustees, executors, administrators, guardians or others appointed to, or assuming the performance of any trust, public or private, under appointment of any court or tribunal, or under contract between private individuals or corporations; also upon *any bond* or bonds that may be *required to be filed in any judiciary proceedings;* also to guarantee any contract or undertaking between individuals, or between private corporations and the State and municipal corporations or counties or between corporations and individuals; to act as executor and testamentary guardian when designated by such decedents; or to act as administrator or guardian when appointed by any court having jurisdiction; also on any bond or bonds that may be required of any State official, district official, county official or official of any school district or of any municipality, provided that the commissioners courts of each county shall have the right to reject any or all official bonds made by surety companies and in their discretion may require any or all officials

to make their official bonds by personal sureties. Any such bond *may be accepted* and approved by the officer charged by law with the duty of accepting and approving the same without being signed by other sureties than such company. When any such bond shall Exceed Fifty Thousand ($50,000.00 Dollars in penal sum, the officer charged by law with the duty of approving and accepting such bond may require that such bond be signed by two or more surety companies, or by one surety company and two or more good and sufficient personal sureties, in the discretion of the principal or official of whom the bond is required, and *any statute or law to the contrary, or requiring any such bond to be signed by two or more good and sufficient sureties, shall be governed and controlled by the provisions of this article.*"

It is astonishing that counsel, who so highly value their services, would ignore the express statement which is the beginning of their last quotation. It is:

"When any such bond shall exceed Fifty Thousand ($50,000.00) Dollars in penal sum, the officer charged by law with the duty of approving and accepting such bond may require that such bond be signed by two or more surety companies, or by one surety company and two or more good and sufficient personal sureties in the discretion of the principal or official of whom the bond is required."

It is difficult to understand how respondent can urge any importance attaches to the word "may" as it

permits only the minimum of one surety company if it is accompanied by two or more good and sufficient personal sureties; or, an *additional* surety company.

Respondents' contention that this Court should be influenced by a general disregard in Texas of the statutory protection of property (especially non-residents') is without merit and is not sustained by the record. No administrative officer testified concerning his acceptance or approval of an attachment bond for $50,000 with but one surety. A valid attachment is admittedly a jurisdictional prerequisite to the forfeiture of a non-resident's property upon execution. Respondents' contentions, (1) as to articles 7.01-7.02; and, (2) attachment and garnishment statutes, has been determined against respondents in each intance where it has been presented to the courts. In *Commonwealth of Massachussets v. United North and South Development Company,* 140 Tex. 417, 168 S.W. (2d) 266 (Tex. Sup. Ct. 1942), the Texas Supreme Court stated that the corporate surety statute did not "add to or take anything from" the special garnishment statute (comparable to the special attachment statute here involved). This latest expression by the Texas Supreme Court is decisive herein. To this recent acknowledgment of the continued vitality of a century old special garnishment statute, should be added the earlier cases construing the special attachment statute as requiring "two or more good and sufficient sureties" *(Mays v. Lewis,* 4 Tex. 1, Tex. Sup. Ct. 1849) ". . . we cannot regard a bond with but one surety, *however responsible,* as a

compliance with a statute which requires two or more sufficient sureties", *Hamberlin v. Aston,* 267 S.W. 684 (Comm. App. Tex. 1924) ". . . When our statute says that a bond must be signed by two or more good and sufficient sureties, it does not mean that it is sufficient when it has only one surety.")

The statement of the Texas Supreme Court in *Commonwealth of Massachusetts v. United North and South Development Company,* 168 S.W. (2d) 226, at p. 229 that the conditions of a garnishment bond "is a matter primarily for the legislature to determine," as the Legislature did here by a special attachment statute and a specific provision pertaining to bonds exceeding $50,000.00, requires only the enforcement of the statute in accordance with the law. This the lower court failed to do to the extent that property may be now levied upon contrary to and not in compliance with the law.

(2) RESPONDENTS ARGUE THAT, "THE TRIAL COURT DID NOT ERR IN REFUSING TO CHARGE THE JURY ON ESTOPPEL". (Brief, pp. 17-20)

Respondents erroneously persist in approaching the question of estoppel as if it may be resolved as a pure question of law—with all the facts viewed in the most favorable light to them. They do not reply to petitioners' authorities establishing that: (1) estoppel is a factual question to be determined by the jury under appropriate instructions; (2) when such a factual issue is withheld from the jury, as did the trial court here, the question on appeal becomes whether there was *any* evidence, however weak, to support the requested instructions; (3) the failure of the trial court to fairly apprise the jury of petitioners' special defense of estoppel by appropriate instructions was plain and prejudicial error; and (4) such action by the trial court effectively deprived petitioners of a jury trial and hence due process on their affirmative defense. (Petition, pp. 12-14).

Respondents assert a Rule 23(e) violation but must concede substantial evidence for a jury to consider appears in the Appendix to the Petition pp. 25-35. Finally, they concede the jury was not instructed upon the elements of estoppel, in fact the jury was not permitted to hear the word, and then they plead that this "departure from the usual and accepted course of judicial proceedings" is a bar to certiorari. (Brief, p. 19.) A refusal to instruct on a crucial defense is a deprivation of the sacred right guaranteed by the Seventh Amendment.

(3) RESPONDENTS ARGUE THAT "THE TRIAL COURT DID NOT ERR IN SUBMITTING ONE ISSUE INQUIRING AS TO WHAT WOULD BE A REASONABLE FEE FOR THE SERVICES RENDERED ON APPEAL BY ALL RESPONDENT LAWYERS". (Brief, pp. 20-22)

No attempt is made to answer petitioners' authorities establishing that the usual and accepted procedure is to submit each independently employed attorney's claim for fees to the jury. (Petition, pp. 14-15.) Again respondents plead with this Court not to issue certiorari. (Brief, p. 20.)

The pleadings and writings support the jury issue that petitioner Burnett selected and employed each respondent. The amount of each statement of each respondent for services was submitted to Burnett for payment and paid until respondents rendered their $100,000.00 statement. The effect of the deprivation of the usual and customary separate verdicts arises out of the following facts: Members of the Kleberg, Mobley, Lockett & Weil firm very ethically testified that their fee would be $7,500.00. (R. 441.) This left $72,500.00 of the $80,000.00 jury verdict for the Graves firm (and he alone rendered substantially all services) and for respondent Kendall, a research assistant. Kendall received $500.00 for trial services involving 39½ hours. (Plts.' Ex. 7.) The jury was permitted to multiply Kendall's trial court compensation 72 times if he is to receive one-half of the $72,500.00 or Graves' fee nearly 5 times if he is to receive the remaining one-half.

(4) RESPONDENTS' ADDITIONAL CONCESSIONS

Petitioners are indebted to respondents for the following significant concessions:

(a) Taxes

Respondents argue that, "The trial court did not err in instructing the jury not to consider income taxes".

When respondents assert that petitioners (Brief, pp. 22-24) waived the point by failing to object, they miss the essence of the point raised, to-wit: disregarding income taxes resulted in a failure of proof as follows:

(1) Respondents admit that "net revenue of $4,700,000" was the basis for "respondents' expert" testifying that the market value of this interest, disregarding income taxes, was $2,000,000. (Brief, p. 5.) To the extent that vital income tax deductions, which are within the judicial knowledge of the Court, would reduce this "net revenue" there is a failure of proof to sustain the verdict. (*Pennsylvania R. Co. v. Chamberlin*, 288 U.S. 333, 77 L.ed. 819 (1933); *Yorkshire Indem. Co. v. Gonzales*, 210 F. (2d) 545 (C.A. 5th, 1954).)

(2) Respondents admit that these income tax considerations if not withdrawn from the jury by the trial court's instructions would have been prejudicial to respondents. (Brief, p. 23.)

(3) Respondents admit that "income taxes have a bearing upon the market value" (Brief, p. 23) but

justify withdrawal of income tax evidence from the jury by contending that the record was limited to a consideration of Burnett's taxes, whereas exhibits furnish positive proof that after deduction of proper income taxes from this $4,700,000 of net revenue there would remain $1,336,781 for any corporate purchaser and $661,344.00 for any individual purchaser because the computation assumes that this amount is the only income received by such a purchaser. This establishes the necessity of a tax deduction by all types of buyers in the business world.

Respondents do not attempt to meet the authorities in the Petition (p. 16) that such withdrawal of evidence results in a violation of due process and a failure of proof by respondents.

(b) "Welcher"

The respondents knew the effectiveness of an accusation of "welching" against the non-resident petitioners as they claimed difficulty in meeting it in the Mar-Tex case even before an Appellate Court. They used it to their advantage in this case before the jury. (Brief, pp. 8-9.) The only reasonable conclusion from the record upon this "welching" is that respondents, as they say (Brief, pp. 8-9) had to meet a claim by Mar-Tex of "welching" instead of the simple issues presented by the mere writings so clearly set forth in the Appellate Court Mar-Tex decision to justify their enormous fees sought in this case. They seized upon this legally flimsy but prejudicial appeal to the hearts of Texans, which, while most effective to the jury in

this case, would not be presumed to be of any important influence upon the Appellate Court judges before whom respondents' fees were earned.

(c) Expert Witnesses

Respondents concede that under standard Texas practice respondents were allowed two weeks after the jury was selected and sworn to use their local knowledge and influence to select, and did select as witnesses, those of their life-long friends most likely to influence particular jurors they knew had been sworn in to try this particular case. (Brief, p. 8.)

CONCLUSION

Petitioners submit that the only way in which the jurisdictional prerequisite of a valid attachment bond may be ignored in violation of the well established rule of strict compliance with summary remedies against non-residents' property is to ignore the fact that the bond here was in a penal sum of more than $50,000.00, and also the special attachment statute, and increase the advantages of a resident over a non-resident by sustaining the following contentions:

(1) That attorneys may use great sums of their client's money in presenting a contention to an appellate court that its construction of admitted writings should not be influenced by an adversary's contention that the non-resident client was a "welcher";

(2) That attorneys may use great sums of a client's money in an effort to force their adversary on such appeal to take the weaker of two positions with reference to the admitted writings; and

(3) "That nothing is so uncertain as a jury verdict or a judge's decision" in the area of the Fifth Court of Appeals (5th Court Opinion, Appendix, p. 5).

In addition to creating a conflict in decisions of state and federal courts upon fundamental rights, great harm may be done to the integrity of courts, if to all the other advantages a resident possesses against a non-resident in litigation, is added a strained or even a liberal construction of the jurisdictional requirements by which the resident may initiate summary remedies against the non-resident's property.

For these reasons, as well as the complete and total failure of respondents to answer the substantial merits of the Petition or to resolve the conflicts created by the decision of the court below, petitioners pray that the writ of certiorari be granted.

June ....., 1956.

Respectfully submitted,

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Counsel for Petitioners.

NORMAN ELLIOTT
of Counsel.